

ESSAY

RACIAL MIND-GAMES AND REAPPORTIONMENT: WHEN CAN RACE BE CONSIDERED (LEGITIMATELY) IN REDISTRICTING?

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The past decade of Supreme Court cases dealing with race and reapportionment, from *Shaw v. Reno* in 1993 to *Easley v. Cromartie* in 2001, have created ambiguity and tension. The Court has constructed a seemingly simple test: race cannot constitute the “predominant factor” in drawing legislative districts. Yet the Court has done little to inform lawyers and lower courts in what contexts race legitimately may be considered in the reapportionment process. In this Essay, Professor Ken Gormley tackles that jurisprudential conundrum from a unique perspective. Professor Gormley is the author of *Archibald Cox: Conscience of a Nation* (Perseus Books 1997), a biography of the Harvard professor turned Solicitor General, who argued the pivotal cases of *Baker v. Carr* and *Reynolds v. Sims* in the Supreme Court and helped draft the Voting Rights Act of 1965. Professor Gormley himself served as Executive Director of the Pennsylvania Legislative Reapportionment Commission in the early 1990’s, confronting race issues first-hand. Professor Gormley concludes that the “predominant factor” test is on the right path, however, to establish a clear guide for lawyers, litigants, and lower courts, the Court must

* Professor of Law, Duquesne University. This Essay was completed in three months, from start to finish. The author only survived that timetable thanks to the help of numerous friends and experts. Professor Pamela Karlan (Stanford) undertook a thorough review of the manuscript and provided many useful comments, despite other reapportionment-related commitments. Professors Heather Gerken (Harvard) (who had a baby in the meantime) and Bruce Ledewitz (Duquesne) also provided invaluable assistance. One of the great pleasures of this project was having the chance to consult with three Harvard Law School friends who are now prominent attorneys practicing in the field of voting rights: Rob McDuff (Mississippi), Joel Pelz (Illinois), and Rex Van Middlesworth (Texas). Their help meant a great deal. My secretary, June Devinney, threatened to strike, but completed the manuscript in record time without complaint. My research assistant, David Cardone, supplied swift, professional research work. Anne Heidel and the staff at the University of Pennsylvania Journal of Constitutional Law provided expert editorial assistance. Finally, this Article is dedicated to the Honorable Robert J. Cindrich, with whom I had the privilege of working on the Pennsylvania reapportionment ten years ago. It is from him that I learned that, although one must watch one’s footsteps carefully in this swamp-like terrain, politics and justice can indeed co-exist.

address when and to what extent race may legitimately play a role in reapportionment; because, he argues, it always does.

INTRODUCTION

Modern redistricting cases are routinely intertwined with maddeningly complex racial issues that increasingly dominate reapportionment jurisprudence. Another Term of the Supreme Court arrives, another rivulet of racial reapportionment cases spills onto the docket. Yet it is worth recalling that the body of law dealing with reapportionment—symbolized by the landmark decisions of *Baker v. Carr*¹ and *Reynolds v. Sims*²—had quite a separate origin from the body of law dealing with minority voting rights. Regrettably, neither legal commentators nor the Supreme Court have adequately separated out, or reconciled, these often conflicting strands of constitutional jurisprudence. The result has been a mish-mash of loosely connected decisions, which have caused lawyers, litigants, and lower courts to struggle when it comes to the basic question whether, and to what extent, race may be considered in redistricting.

The Supreme Court sought to eliminate confusion in this area by crafting a test, initially articulated in a 1995 case, *Miller v. Johnson*,³ that prohibits the creation of a voting district where race is the “predominant factor” motivating the reapportionment body. Yet, the Court still has not fully fleshed out that standard.⁴ Nor has it confronted the reality that race is *always* a motivating force to some extent in modern legislative map-drawing. As a result, the “predominant factor” test has led to disingenuity and, at times, outright deception. It has encouraged litigants, lawyers, and state officials to swear that race was not a factor in redistricting (with their fingers crossed behind their backs), for fear that the ambiguous test might be turned against them.

In my role as Executive Director of the Pennsylvania Legislative Reapportionment Commission (“Commission”), which commenced in early 1991 and spanned several years, I had a front-row seat, enabling me to observe the underbelly of state reapportionment politics. The Commission defended itself against twenty-seven lawsuits, including one major Voting Rights Act suit in Philadelphia, and won them

¹ 369 U.S. 186 (1962).

² 377 U.S. 533 (1964).

³ 515 U.S. 900 (1995).

⁴ For the perspective of one commentator who has criticized the jurisprudence in this area, asserting that it is “on the brink of legal incoherence and political chaos,” see Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505-06 (1997).

all.⁵ Even with this legal success, the battle over race issues was a sobering one. A close-up view of the down-and-dirty exercise of redistricting leaves me convinced, a decade later, that the Supreme Court's "predominant factor" test, as it has evolved, is moving in the right direction. Moreover, the Supreme Court's recent decision in *Easley v. Cromartie*⁶ indicates that the Court is beginning to grasp the intricacies of reapportionment politics. *Easley* is the first major case in a decade in which the Court, on plenary review, has upheld a redistricting plan in the face of a racial gerrymandering challenge. Significantly, *Easley* involved a situation in which race was clearly a factor in the machinations that led to the congressional redistricting in North Carolina. Nonetheless, the Court upheld the plan, concluding that traditional party politics was the *predominant* factor driving the reapportionment body's construction of a district that encompassed a large segment of African-American voters.

The result in *Easley* was a sensible one. However, unless the "predominant factor" test is more sharply defined to specify when racial considerations are permissible—under the Fourteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act—and when such considerations are prohibited, the law will continue to be used primarily to bludgeon political opponents and cause partisan mischief, rather than to move voting rights jurisprudence forward productively. Moreover, until the test is clarified, every major redistricting fight will continue to be transformed into a case of mandatory appellate jurisdiction in the United States Supreme Court.

State legislative bodies and lower courts must be able to take a judicially-created standard and translate it into practical applications. Unfortunately, the "predominant factor" test is ambiguous enough that it has permitted a dangerous assumption to take root since its inception; namely, that it is presumptively illegal and unconstitutional for racial considerations to enter the redistricting process for the benefit of minorities.⁷ As will be seen in this Essay, there are numerous instances in which the creation of districts with conscious consideration of racial factors is a perfectly reasonable (and indeed inevitable) occurrence. The challenge must be to sort out the permissible

⁵ See KEN GORMLEY, THE PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT OF 1991 54-67 (1994) [hereinafter GORMLEY, REAPPORTIONMENT].

⁶ 532 U.S. 234 (2001). The case was originally captioned *Hunt v. Cromartie*, 530 U.S. 260 (2000) (noting probable jurisdiction), however, the name of the new Governor of North Carolina, Michael F. Easley, was substituted for former Governor James B. Hunt, Jr., pursuant to Supreme Court Rule 35.3.

⁷ See *infra* notes 178-81 and accompanying text. For an example of scholarship encouraging that view, see Judge Edith H. Jones, *Judge Thomas and the Voting Rights Act*, 12 REGENT U. L. REV. 333 (1999-2000).

from the impermissible so that the “predominant factor” test can move to a new level of constitutional utility.

I will argue that the Supreme Court’s first task must be to separate the “one-person-one-vote” strand of reapportionment cases linked to the Equal Protection Clause of the Fourteenth Amendment from the distinct body of Voting Rights Act jurisprudence premised upon the Fifteenth Amendment. There is some overlap, of necessity. The guarantee of equal protection under the laws certainly has relevance in redistricting cases involving vote dilution, where one group of citizens is alleged to have benefited at the expense of another because of race. The Fifteenth Amendment also remains relevant. Exercising its enforcement powers under that Amendment, Congress has enacted the Voting Rights Act, which creates a different standard than that ordinarily applicable in Fourteenth Amendment jurisprudence. The latter generally requires proof of intentional discrimination; the former does not. Only by separating out these two distinct lines of case-law, which have become hopelessly intermingled, can the “predominant factor” test begin to make sense in an area where two constitutional provisions intersect.

Second, I will argue that a revised “predominant factor” test must be anchored upon a frank acknowledgment that in American society, mandating that political mapmakers cease and desist from considering race in any fashion in the redistricting process is unworkable, unrealistic, and undesirable. This mandate is inconsistent with the Voting Rights Act and the Fifteenth Amendment and is tantamount to encouraging silent discrimination against minorities.

The reapportionment process employs every tactic—fair, unfair, pretty, and not pretty—as political competitors seek to gain advantage over a host of different adversaries. It ultimately takes into account not only race but ethnicity, religion, political affiliation, gender, age, employment profile, veteran status, predisposition to vote, and an unwieldy collection of other characteristics that define those interest groups at work within any given political subdivision. That, after all, is the essence of politics. The moment race is banned as a factor that can be considered in accommodating certain minority groups in a positive fashion, it will be used *sub silentio* to harm those groups,⁸ frustrating the express purposes of the Fifteenth Amendment and the Voting Rights Act. A fine line exists between prohibiting the use of race to affirmatively favor minorities in an improper fashion and mandating that states wear blinders to race in a manner

⁸ As one commentator has expressed, “color-blindness” often becomes “a mere code word for African-American invisibility.” Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 307-08 (1996).

that facilitates a silent, surreptitious embrace of traditional discriminatory practices.

In the trenches of reapportionment, the "race card" is frequently played by lawyers and litigants on both sides. For years, particularly after the Supreme Court's decision in *Thornburg v. Gingles*,⁹ plaintiffs argued that the Voting Rights Act required "maximization" of majority-minority districts, or at least strict proportionality, where significant racial bloc voting could be proven. That position has since been rejected definitively by the Court.¹⁰ Yet certain members of the Court and of the legal academy have now floated the opposite view, which is equally non-productive—namely, that the conscious consideration of race under any circumstances is anathema.¹¹ As long as lawyers and public officials in the reapportionment field struggle under that misperception, the Court will have to dig through piles of discarded maps and data each decade in an effort to answer the elusive question: Was race a factor in the construction of this reapportionment plan or that redistricting map? Of course, the answer is always "yes," but the more relevant question is "to what extent?" The Fifteenth Amendment and the Voting Rights Act of 1965 serve as a modern testament to that harsh fact that race and politics are inextricably intertwined in American life.¹² The current case-law adequately informs reapportionment bodies what they *cannot* do in creating redistricting plans. The Supreme Court must now tackle the positive obverse of the negative "predominant factor" test and explain when and to what extent race *can* legitimately be considered in redistricting.

In other words, legislators and redistricting bodies must have a certain zone of discretion, within which they may safely consider race as *a* factor in performing their reapportionment work, just as they consider countless other factors. This is different than seeking to instruct reapportionment bodies what they *must* do to comply with the law—that is the subject of another body of literature which addresses the parameters of the Voting Rights Act¹³ and the breadth of its mandate. A quite separate question that must be addressed is: How does one define the scope of the reapportionment body's discretion to take race into account when drawing districts, if it wishes to do so?

Until the Court answers that central question, those who labor in the fields of reapportionment will remain perplexed, frustrated, and inclined to avoid the issue for fear of walking into a nest of hornets.

⁹ 478 U.S. 30 (1986).

¹⁰ See *infra* notes 190-91 and accompanying text.

¹¹ See *supra* note 7.

¹² For a discussion of the history of the Voting Rights Act and its evolution, see *infra* notes 113-39 and accompanying text. See also DAVID MICHAEL HUDSON, *ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT* (1998).

¹³ See generally HUDSON, *supra* note 12. See also *infra* note 129.

I. CONFESSIONS FROM THE REAPPORTIONMENT TRENCHES: HOW ONE STATE INTENTIONALLY CREATED MINORITY DISTRICTS

My own experience working on the Pennsylvania reapportionment in 1991 provides a typical illustration of how race can be, and routinely is, considered in a conscious fashion as part of the redistricting process. Race was a significant force in the Pennsylvania redistricting process. Indeed, in the end, race was intentionally and openly considered in drawing state House and Senate districts. I remain convinced, however, that there was nothing improper, unconstitutional, or illegal about that process. In fact, the natural adherence to traditional districting principles and the legitimate concern for avoiding maps which (intentionally or unintentionally) might produce racially discriminatory *results* in contravention of the Voting Rights Act, combined to make the conscious consideration of race unavoidable. A brief history will demonstrate how racial factors do, and must, embed themselves in a balanced redistricting mosaic.

A. History

In 1986, before I commenced work for the Pennsylvania Legislative Reapportionment Commission, the United States Supreme Court issued an opinion that dramatically altered the way reapportionment bodies viewed race issues. In *Thornburg v. Gingles*,¹⁴ the Supreme Court upheld Congress's 1982 amendments to the Voting Rights Act, which gave minority groups more sway in overturning redistricting plans that unfairly boxed them out of the political process.¹⁵

Prior to *Gingles*, the Supreme Court had issued a rigid opinion in *Mobile v. Bolden*,¹⁶ departing from prior case-law and holding that

¹⁴ 478 U.S. 30 (1986).

¹⁵ In *Gingles*, plaintiffs challenged the use of multimember state House and Senate districts under a North Carolina redistricting plan. The map, pursuant to Section 5 of the Voting Rights Act, had been precleared by the Justice Department, pursuant to 42 U.S.C. § 1973(c). The Supreme Court reviewed the legislative history of Section 2 of the Voting Rights Act to determine whether the new North Carolina plan satisfied the "results" test set forth in the recent amendments to the Act. Justice Brennan, writing for the majority in *Gingles*, observed that the essence of a Section 2 claim was that some "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In light of the 1982 amendments, the question turned on whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44. The Court concluded that all but one of the challenged multimember districts created by the North Carolina legislature violated Section 2 of the Voting Rights Act.

¹⁶ 446 U.S. 55 (1980).

plaintiffs were required to prove discriminatory *intent* in order to establish a claim under the Voting Rights Act. The "intent" requirement amounted to a weighty burden on plaintiffs, making it virtually impossible to prove a violation of the Act without producing the proverbial smoking gun. In 1982, however, the legislative branch rejected this stringent reading of the Voting Rights Act. Congress specifically amended the Act to include a more plaintiff-friendly "results" test,¹⁷ which had been applied intermittently by the Supreme Court prior to *Mobile*.¹⁸ Congress did not need to look far to justify amending the statute in this fashion; the insidious effects of widespread discrimination in voting rights were on display in its own chambers. In the Congress that convened in 1981, for instance, there were only 17 black representatives out of 435. This was true despite the fact that the American voting-age population was 10.5 percent black.¹⁹ As the Senate Report accompanying the 1982 amendments indicated: "[S]ince the adoption of the Voting Right Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength."²⁰

The white Chairman of the Georgia House Reapportionment Committee had declared at the time of the 1970's redistricting: "I don't want to draw nigger districts."²¹ In modifying Section 2 of the Act to focus on results rather than intent, Congress sought to put an end to lingering, surreptitious racist practices. It endorsed the Supreme Court's pre-*Mobile* view, expressed in cases like *White v. Regester*,²² which acknowledged that determining whether subtle forms of discrimination were at work required a results-oriented analysis that "depends upon a searching practical evaluation of the 'past and present reality.'"²³ As amended in 1982, the Voting Rights Act provided a statutory cause of action for plaintiffs whenever they could prove that a voting standard, practice, or procedure had "resulted" in discrimination based upon race. The *Gingles* Court set forth a three-part test for determining whether legislative districts violated the newly-amended Act and impaired the ability of minorities to elect candi-

¹⁷ S. REP. NO. 97-417, at 10 (1982) [hereinafter Senate Report], quoted in *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994). See also *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 641 (1993).

¹⁸ See, e.g., *White v. Regester*, 412 U.S. 755 (1973).

¹⁹ STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83 490 tbl. 802 (103d ed. 1982), cited in *Bush v. Vera*, 517 U.S. 952, 1050 (Souter, J., dissenting).

²⁰ Senate Report, *supra* note 17, at 10, quoted in *Johnson*, 512 U.S. at 1018.

²¹ *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982) (listing findings of fact).

²² 412 U.S. 755 (1973). For evidence that Congress specifically intended to return to a "results test," as applied by the Court in *White* and by other lower federal courts prior to *Mobile*, see Senate Report, *supra* note 17, at 28, cited in *Gingles*, 478 U.S. at 35.

²³ Senate Report, *supra* note 17, at 30, quoted in *Johnson*, 512 U.S. at 1018 (citing *White v. Regester*, 412 U.S. at 770).

dates of choice. Plaintiffs were required to establish the following three "preconditions" as a threshold to making out a claim under Section 2:

1. The minority group was sufficiently large and geographically compact to constitute a majority in a single-member district;
2. The minority group was politically cohesive; and
3. In the absence of special circumstances, "bloc voting" by the white majority usually defeated the minority group's candidate of choice.²⁴

The *Gingles* Court also sought to give substance to the "totality of the circumstances" test embodied in Section 2(b). It pointed to seven "typical factors," derived from the 1982 Senate Report, that should be considered by courts in determining whether a Section 2 claim had been established by minority plaintiffs.²⁵ Although *Gingles* itself involved at-large elections, the test set forth in that case soon became the accepted standard for other minority vote dilution cases.²⁶

The upshot of *Gingles* was that some lower courts, embracing a position advanced by the NAACP and other minority groups, concluded that *if* a majority-minority district could be created—containing over fifty percent minority voting-age population, or roughly sixty-five percent total population—it *had* to be created, at least where significant racial bloc voting could be demonstrated.²⁷ Indeed, some courts and

²⁴ *Gingles*, 478 U.S. at 50-51.

²⁵ These factors included:

1. The history of voting-related discrimination in the state or political subdivision;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
4. The exclusion of members of the minority group from candidate slating processes;
5. The extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. The use of overt or subtle racial appeals in political campaigns, and;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44-45.

²⁶ *Grove v. Emison*, 507 U.S. 25, 40-41 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 157-58 (1993). As a practical matter, however, the *Gingles* test is not nearly as easy to apply when it comes to single-member districts. For a good discussion of the evolution of the case-law before and after *Gingles*, see BERNARD GROFMAN, ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 4-21, 61-81 (1992) [hereinafter GROFMAN, MINORITY REPRESENTATION].

²⁷ See, e.g., *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991); *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd in part, vacated in part*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). As a rule of thumb, over fifty percent minority voting-age population translated into approximately sixty-five percent total

minority organizations broadened the argument to suggest that if a state *could* produce a "minority-influenced" district, in which minority voters existed in sufficient numbers (albeit less than a majority) to influence an election, creating such a district might be mandated by the Voting Rights Act.²⁸ Frank Parker, senior voting rights lawyer at the Lawyers' Committee for Civil Rights Under Law, declared in the summer of 1991: "[W]e have the law more on our side than ever before."²⁹

By the time redistricting had moved into the 1990's, race claims were poised to dominate. The reasons were threefold. First, computers had entered the scene, replacing pads of paper, pencils, and cartographers who had previously drawn maps by hand, and permitting the creation of districts with far smaller population deviations. The ability of computers to generate an endless array of possible reapportionment configurations, within specified levels of population deviation, made it fairly easy to bring maps within the guidelines that had been established by the federal courts over the prior three decades. Indeed, the federal courts had largely thrashed out what population differences were permissible under the Constitution. "One-person-one-vote," in other words, was no longer a significant challenge for any sophisticated map-making operation. Second, with the 1982 congressional amendments to the Act and the Court's decision in *Gingles*, what a voting rights plaintiff needed to prove in order to succeed became much more straightforward. Third, census data was broken down on a block-by-block basis rather than by tract and new software permitted the use of racial data to manipulate districts with

minority population. See NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT LAW: THE 1990'S 62 (1989).

²⁸ The notion of "minority-influenced" districts was prompted by Justice O'Connor's concurrence in *Gingles*, in which she seemed to specifically leave open the possibility of requiring such districts under the Act, stating:

I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute threshold requirement for a claim [under Section 2] . . . I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability to elect the representatives of [its] choice" has been impaired and claims that "its ability to influence elections" has been impaired.

Gingles, 478 U.S. at 89-90 n.1 (O'Connor, J., concurring) (citations omitted).

A federal court in Ohio had recently added support to the suggestion that such "influence" districts might be required under *Gingles*. See *Armour v. Ohio*, 895 F.2d 1078 (6th Cir. 1990), *vacated on other grounds*, 925 F.2d 987 (6th Cir. 1991). See also *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). One noted scholar predicted that when the time came, the Supreme Court would embrace the requirement of "influence" districts under Section 2 of the Act. See also Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 206 n.129 (1989).

²⁹ Stuart Taylor, Jr., *Electing by Race*, AM. LAW., June 1991, at 54; Ken Gormley, *Reapportioning Election Districts: An Exercise in Political Self-Preservation*, USA TODAY MAG., Jan. 1997, at 22, 24 [hereinafter Gormley, *Reapportioning Election Districts*].

precision never before imagined.³⁰ Race claims, with minority groups as both plaintiffs and defendants, mushroomed in number.³¹

Across the United States, the *Gingles* decision produced odd alliances and strange bedfellows as groups scrambled to turn the Supreme Court's ruling into political advantage. Nationwide, the Republican Party adopted a strategy of aligning with the NAACP and other minority groups to push for apportionment plans that created new majority-minority districts and "minority-influenced" districts in urban areas. The political calculus was overt: creating such minority districts would simultaneously produce new Republican-friendly districts in heavily white suburbs.³² The Democratic Party, not used to finding itself opposing civil rights organizations, struggled to convince minority groups not to abandon the party that had traditionally been their base;³³ yet, it was forced to sheepishly don its armor and go into battle, fighting to preserve control of its Democratic turf. Under President George H.W. Bush, the Justice Department aggressively sought to support voting rights litigation in federal courts. John Dunne, then the head of the Department's Civil Rights Division, admitted that his vigorous enforcement policies "may have the effect" of helping the Republican party. Yet Dunne stressed that his sole motive was "to enforce the law in very strong, vigorous terms," as Congress had intended.³⁴

B. Racial Skirmishing and Cynical Alliances

In Pennsylvania, as the 1991 reapportionment got underway, the Legislative Reapportionment Commission faced the full impact of *Gingles*. In Philadelphia, where African-American and Latino populations were sizeable, the Senate Republican caucus pushed aggressively for redistricting maps that maximized the voting strength of minorities by adding one or two majority-minority districts, while wreaking havoc on prime Democratic territory and creating the prospect of one or two new Republican seats in the predominantly-white suburbs. Democrats in the state Senate staunchly opposed such "pro-minority"

³⁰ See, e.g., *Bush v. Vera*, 517 U.S. 952, 961-62 (1996) (describing use of the REDAPPL computer program that contained block-by-block racial data permitting redistricting officials to make "intricate refinements" on the basis of race).

³¹ For a useful discussion of this period, see Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237 (1993).

³² See *id.* See also Abigail M. Thernstrom, *Redistricting: Civil Rights Groups—GOP Partners in Quota Conspiracy*, PHOENIX GAZETTE, Oct. 3, 1991, at A13; Ronald H. Brown & Daniel Hays Lowenstein, *A Democratic Perspective on Legislative Districting*, 6 J.L. & POL. 673, 675-80 (1990).

³³ See Chuck Alston, *Democrats Court Minorities to Counter GOP's Pitch*, CONG. Q., May 4, 1991, at 1103.

³⁴ Taylor, *supra* note 29, at 52.

plans. Yet for reasons unclear initially, they opposed alternative maps that would boost minority strength in Philadelphia, even those that seemed to pose no threat to the Democratic Party. One particularly attractive compromise had been offered by the Commission Chairman, Robert J. Cindrich (a prominent Pittsburgh attorney, now a federal judge) that seemed to accommodate minority groups without diluting Democratic strength in the Philadelphia area. The Senate Democratic caucus, nonetheless, dug in and refused to budge.

In this domain, where race and politics intersected, much of the political strategizing was counter-intuitive. Among the first groups that stepped forward to oppose the creation of new African-American House and Senate districts were the Black Legislative Caucus and several minority interest groups in Philadelphia. The ostensible reason for this opposition was to avoid "further segregat[ing] the African-American community from the body politic of Philadelphia."³⁵ Yet it became increasingly evident that minority legislators in both the House and Senate, some of whom occupied districts with African-American populations as high as eighty or ninety percent, did not wish to give up those enormously favorable margins (at least initially), even in the name of creating additional majority-minority seats.³⁶

Democratic caucus members also opposed the creation of additional minority seats, as we discovered during the course of frank, late-night discussions in the Reapportionment Commission office, due to competing pressures from other groups. Much opposition came from Italian-Americans and other groups in Philadelphia who expressed vocal dissatisfaction with the possibility that African-Americans would receive "more than their share" of clout in the legislature. Numerous ethnic and racial groups, it turned out, were lobbying for maps that gave themselves additional political strength.³⁷

In the House, the resistance to drawing minority districts was particularly puzzling. Republicans sought to create additional minority seats in Philadelphia, in a fairly balanced fashion, without driving a knife into the heart of Democrat strongholds. Yet the Democratic caucus adamantly opposed any map that had not been generated by its own computer. It informed the Chairman and Executive Director that it had retained a "voting rights expert," who had scrupulously reviewed every square inch of every proposed map. The plans submitted by the Democrats, caucus leaders insisted, while not maximizing

³⁵ Transcript of Legislative Reapportionment Commission Public Meetings at 20 (Nov. 15, 1991) (Pennsylvania State Archives) (remarks of Senator Robert Mellow, reading from letter submitted by Senator Roxanne Jones); GORMLEY, REAPPORTIONMENT, *supra* note 5, at 50.

³⁶ Gormley, *Reapportioning Election Districts*, *supra* note 29, at 24.

³⁷ *Id.*

minority representation, carefully complied with the letter and the spirit of federal law.

The decision whether to intentionally create one additional Philadelphia majority-minority seat in the Senate and several majority-minority seats in the House (along with a strong minority-influenced seat for the Latino community) turned out to be the most difficult of the entire reapportionment process. The Chairman and I opened direct communications with the Pennsylvania Legislative Black Caucus, the NAACP's National Redistricting Project, the Philadelphia Latino Voting Rights group, and other minority organizations that had displayed an interest in participating in the process. Our goal was to identify, in advance, those plans that yielded the fairest results for the minority groups themselves, once stripped of the lacquer of partisan politics. The Commission also hired Dr. Richard L. Engstrom of the University of New Orleans, a nationally recognized expert in Voting Rights Act analysis, to provide guidance as to the most appropriate configurations in light of the *Gingles* decision and the commands of the Voting Rights Act and the Fifteenth Amendment.³⁸

At the early public hearings, a spokesperson for the NAACP took the position that, in light of *Gingles*, the Commission was obligated to create majority-minority districts and "minority-influenced" districts wherever it could. "Any action that results in the dilution of the black community's voting strength," the NAACP spokesperson stated, "is a violation of the Act."³⁹

At the same time, the Commission was extremely mindful of, and impressed by, the testimony of Professor Abigail Thernstrom at an early public hearing on proposed redistricting maps. Dr. Thernstrom had received her Ph.D. from Harvard, was an adjunct Professor of political science at Boston University, and the author of *Whose Votes Count?: Affirmative Action and Minority Voting Rights*.⁴⁰ The premise of this acclaimed but controversial book and the subject of Dr. Thernstrom's forceful testimony was that the Voting Rights Act should not be utilized to institute "de facto apartheid."⁴¹ Dr. Thernstrom took

³⁸ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 48-50.

³⁹ Transcript of Public Hearings of the Pennsylvania Legislative Reapportionment Commission at 10 (Sept. 5, 1991) (Pennsylvania State Archives); GORMLEY, REAPPORTIONMENT, *supra* note 5, at 29-30. See also Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1210 (1999) (stating that "by the early 1990's it had become an article of faith with the Department of Justice and many civil rights advocates that [the Act] required the creation of majority-minority electoral units whenever feasible").

⁴⁰ ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987).

⁴¹ Transcript of Public Hearings at 18 (Sept. 5, 1991) (Pennsylvania State Archives); GORMLEY, REAPPORTIONMENT, *supra* note 5 at 30.

the position that the 1982 amendments to the Voting Rights Act were not designed to force reapportionment bodies to draw the maximum number of "safe" minority districts, or to engage in affirmative "racial gerrymandering." Nor did the *Gingles* decision, she believed, require such a course. Rather, the new emphasis on creating minority districts wherever possible was built upon the faulty assumption that "whites can't represent blacks and blacks can't represent whites."⁴² Thernstrom believed that following such a course would cause American society to "walk backwards on the race relations front towards a more racially divided society," to the ultimate detriment to minority groups in the political process.⁴³ Dr. Thernstrom strongly urged that Pennsylvania and other states not "cave in" to what she described as the "cynical alliance between Republicans and civil rights groups on voting rights matters." Ultimately, she concluded, this sort of racial gerrymandering would produce negative ramifications for black citizens across the nation.⁴⁴

Dr. Thernstrom's testimony and the message that it so forcefully conveyed caused us months of anguish over the wisdom of intentionally creating new minority districts. Ultimately, three events convinced the Chairman and me that it was essential to take this step.

1. *A Tour of Philadelphia*

As part of the fact-gathering process, the Reapportionment Commission toured Philadelphia in a van. We observed first-hand the minority communities that were potentially affected by the new redistricting map before meeting with the Philadelphia Chapter of the NAACP at its Urban Education Center. We then drove through that portion of the city dominated by Latino and mixed Latino/African-American populations. The Commission met with members of the Philadelphia Latino Voting Rights Committee at their office in *Centro*

⁴² Transcript of Public Hearings at 22 (Sept. 5, 1991) (Pennsylvania State Archives).

⁴³ *Id.* at 24.

⁴⁴ *Id.* at 24, 32-33, 49. A similar theme had been sounded by prominent African-Americans including John E. Jacob, President of the National Urban League, during his keynote address to that organization's membership at their annual conference in Atlanta. See John E. Jacob, Address at Keynote Session, National Urban League Annual Conference (July 21, 1991) (transcript on file with author). Mr. Jacobs commented:

Right now congressional district lines are being redrawn by state legislatures. With the help of technical experts from the Republican Party, some districts are being reshaped to rope in as many African-American voters as possible. Some think that's a great idea—creating all-black districts to ensure election of black representatives. But we have to ask if this isn't a new form of political apartheid—assuring some safe congressional seats for blacks at the cost of losing influence with legislators from adjoining districts.

Id. at 8. For an eloquent reply to the general theme sounded by Professor Thernstrom, see Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 298-301 (1997) [hereinafter Karlan, *Loss and Redemption*].

*Pedro Claver.*⁴⁵ What was sobering about this tour of the Philadelphia Latino community was the extreme poverty that was evident once we crossed the line into the Latino neighborhoods. There were abandoned cars on the streets, fire hydrants knocked over making them inoperable, and school buildings disintegrating with no evidence of repairs in recent decades. When we met with members of the Latino organization, one Commission member asked if their neighborhood had always been in such distress. Chairperson Patricia DeCarlo answered: "Yes. This is what happens if you have no influence in Harrisburg. Funding comes from political clout. We don't have any of that. We don't want special privileges—we just want you to draw lines around us, where we live, so we have the same political power that every other group has."

It quickly became evident that the Latino community was not asking the Commission to pervert the redistricting process in order to give its members unfair advantages in drawing districts. To the contrary, the Latino community simply wished to have lines drawn around their existing homes and communities to reflect their genuine presence as a politically and socially cohesive group. Like many other groups in Philadelphia that lobbied hard to be "kept intact" in the new legislative maps, they wished to exert some measure of influence in the Pennsylvania legislature. Indeed, it was through past efforts to quietly but systematically drive wedges through their communities and splinter them into unrelated districts—to benefit other groups that had access to legislators—that the burgeoning Latino community in Philadelphia had been routinely blocked from electing representatives of choice. This translated into tangible proof of the Latino community's political powerlessness, which was in full view as we toured the depressed Latino section of Philadelphia.

2. *The House's "Voting Rights Expert"*

In drafting proposed maps for new House districts, the House Democrats had insisted that, while their configurations did not maximize minority representation, they were scrupulously constructed in compliance with the Voting Rights Act. Indeed, the Democratic staffers had reassured us that they had gone to the trouble of hiring a voting rights expert, whose job it was to review the maps and to confirm that they had complied with federal law.

After staying up late in a hotel room one night pondering maps and population data ourselves, the Chairman and I were puzzled about certain racial demographics. We paid a visit to the Democratic staff offices in the Capitol building to voice our concerns. When we

⁴⁵ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 31-32.

requested to meet with the Democratic caucus's voting rights expert, there was an uncomfortable silence. The Democratic staffer vanished for several minutes. He returned with a flushed face, then ushered us into a vacant computer room, where he introduced us to a white incumbent House member from Philadelphia whose seat was in jeopardy. This legislator occupied a district that was increasingly dominated by African-Americans, but had created preliminary maps that had managed to steer blacks into adjoining areas and maintain a safe seat for himself. This was the Democratic caucus's "voting rights expert."⁴⁶ Needless to say, we found more inequities in the proposed House maps once we returned to the hotel.

3. *The Ugliest Night*

The most sobering lesson about the practical interplay between race and reapportionment came one night, just past midnight, in the ornate legislative chambers within the Capitol building. The Chairman and I had re-worked the numbers in the House plan and had concluded that fairness and the Voting Rights Act dictated that two new majority-minority seats should be created in Philadelphia to correct the obvious pattern of drafting districts to protect white incumbents by "splitting" or "packing" black voters. Then-Speaker Robert O'Donnell volunteered to increase the African-American population in his own district, converting it into a majority-minority district. For the second district, we identified a predominantly African-American area of Philadelphia that had been gerrymandered to allow an incumbent white legislator to cling to his seat. The Speaker was willing to make modifications to this incumbent legislator's district, on one condition: the Chairman and I had to make the telephone call to the legislator in question. It was our duty to break the unhappy news to him.

We sat in the plush office of one of the House leaders as a large mahogany clock ticked in the corner. Cigars were passed out, for those who indulged. I dialed the number while the Chairman picked up a second phone on the same line. It rang a dozen times before a voice answered. The Philadelphia legislator had been asleep. After the Chairman and I introduced ourselves, there was a half-hearted attempt at pleasantries. Then we delivered the news—the minority population in the legislator's district would increase by six percentage points. This would bring it in line, the Chairman explained, with the actual minority population, which was growing steadily in that area of Philadelphia.

⁴⁶ See Gormley, *Reapportioning Election Districts*, *supra* note 29, at 25.

There was a long silence. We could hear the legislator rummaging around in a drawer and extricating a piece of paper. He returned to the phone and barked: "What the hell. Those ain't the numbers they promised me." The Chairman replied that there had been no promises of which he was aware. Any promises made without his approval did not count.

The legislator replied: "Look, I'm a white mother-f—er from Philadelphia. And I don't want *no* more blacks or Spics in my district."⁴⁷

Of course, he got exactly what the Chairman said he got, because the Chairman held the tie-breaking vote on the final reapportionment plan. Yet that incident convinced me, in a world where race was inseparable from partisan politics, that it was essential to have a Voting Rights Act. Moreover, it was essential for redistricting bodies to keep one eye on that statute in order to ensure rudimentary fairness towards minority groups. Otherwise, numerous other groups, particularly those in power, would consciously manipulate lines in order to advantage their own interests at the expense of the interests of minority groups, with few fingerprints left on the computer keyboards that create state legislative maps.

C. The Intentional Creation of Minority Districts in Philadelphia

Ultimately, a final plan was forged at the Chairman's insistence, despite resistance from both political parties, that created additional minority seats in both the House and Senate in Philadelphia. The Commission's actual voting rights expert, Dr. Richard Engstrom, conducted regression analyses—the method commonly utilized in the field and conducted in *Gingles*—to determine where the Commission would most likely be vulnerable to legitimate challenges under the Voting Rights Act. Particularly in Philadelphia, and to a lesser extent in Pittsburgh and Harrisburg,⁴⁸ Dr. Engstrom explained where districts might be created that would allow African-Americans and Latinos to elect candidates of choice, based upon those groups' natural population patterns. Additionally, he demonstrated how this could be done without abandoning traditional reapportionment principles such as compactness and contiguity.

Dr. Engstrom's analysis of the data indicated that a voting rights plaintiff would have little difficulty in establishing the three basic *Gingles* pre-conditions in Philadelphia, Pittsburgh, or Harrisburg. Indeed, like most experts in this field with whom we consulted, Dr. Engstrom was confident that establishing the three *Gingles* pre-

⁴⁷ *Id.*

⁴⁸ See discussion of the three *Gingles* pre-conditions *supra* note 24.

conditions as a predicate for a voting rights suit was a relatively straight-forward task in most urban areas in the United States where significant minority populations existed.⁴⁹

When the Commission convened on November 15, 1991 to vote on a final plan, House Democratic and Republican leaders agreed to accept a new map that created two additional majority-minority African-American House districts in Philadelphia, one majority-minority Latino seat, and a seat with a strong Latino influence (30.6%) in that segment of the city where the Latino community was growing rapidly.⁵⁰

In the Senate, despite opposition from the Democratic and Republican caucuses, both of which voted against the final plan, the map contained only one new majority-minority seat (rather than three) that contained roughly sixty percent African-American population. The plan also contained a separate district that encompassed the bulk of the Latino population (23%), to keep that minority group intact within a single senatorial district. This map stood in sharp contrast to earlier Democratic plans that had packed black voters into three districts and split Latino voters randomly. It also stood in contrast to Republican plans that had created a fourth "majority-minority" district by aggregating African-Americans and Latinos into a single district (despite the fact that these two minority groups, according to Dr. Engstrom's analysis, did not vote cohesively). Not surprisingly, the failed Republican plans would have created a fertile new Republican district on the fringe of the Philadelphia suburbs.⁵¹

Chairman Cindrich stated at the conclusion of the raucous hearings:

I have done what I perceived to be my job, and I think it is my job to be the person who looks out for interest that would not otherwise be protected. It is the legitimate function of the political parties, both Republican and Democrat, to press their interests and to press them hard, to gain political advantage where they can, and it's my job to see that the voter is protected. It's my job to see that the minorities are protected and that the Constitution is adhered to. And in doing so, that sometimes doesn't make the parties happy at all.⁵²

Even with that vote on the final reapportionment plan, the racial jockeying was not over. A Voting Rights Act suit was immediately filed in federal court, alleging that the final map in Philadelphia

⁴⁹ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 49.

⁵⁰ Transcript of Legislative Reapportionment Commission Public Meetings at 20, 106-09 (Nov. 15, 1991) (Pennsylvania State Archives); GORMLEY, REAPPORTIONMENT, *supra* note 5, at 50.

⁵¹ *Id.* at 50-51.

⁵² *Id.* at 52; Transcript of Legislative Reapportionment Commission Hearing at 103-04 (Nov. 15, 1991) (Pennsylvania State Archives).

failed to adequately protect minority voters.⁵³ Once again, race and politics were inextricably intertwined, just as they had been during intra-Commission skirmishing. The Commission's lawyer obtained a written stipulation after conducting depositions that the six plaintiffs had no independent knowledge relating to the lawsuit. Indeed, they all admitted that they had been recruited by the Executive Director of the Republican City Committee in Philadelphia, based upon the theory that the final plan "did not create adequate opportunities for Republican candidates to win elections in Philadelphia's seven senatorial districts."⁵⁴

U.S. District Judge John P. Fullam held a brief trial and dismissed the suit less than three months later, finding that the final plan "has the unanimous support of all minority organizations" in the Philadelphia area which had actively participated in the reapportionment process.⁵⁵ Judge Fullam also found that the Commission's plan was consistent with the dictates of the Voting Rights Act—although he never found it necessary to decide if a violation of that Act had been proven—because it furthered the legitimate interest of protecting minority citizens in Philadelphia who would otherwise be silently drawn into unfavorable positions in the redistricting map.⁵⁶ To the very end, race drove the reapportionment process in complicated and counter-intuitive ways. Only through the conscious effort to protect the rights of racial minorities, whose sheer numbers in population within certain areas of the state, particularly in Philadelphia, warranted fair representation, was the rough-and-tumble political exercise of reapportionment kept relatively fair.

II. RACE AND REAPPORTIONMENT: TEN YEARS LATER

In the years following my experience as Executive Director of the Pennsylvania Legislative Reapportionment Commission, I have come to conclude that the approach of the NAACP and other minority organizations in the early 1990's was not necessarily the most productive one, even to advance those groups' own legitimate causes. Interpreting *Gingles* to mean that if a majority-minority district *could* be created, it *had* to be created under the Voting Rights Act, led to the construction of a series of tortured districts that did little to further voting rights in the United States. The North Carolina congressional district at issue in *Shaw I* was described as "irregular on its face,"⁵⁷ "bi-

⁵³ *Harrison v. Pa. Legislative Reapportionment Comm'n*, No. 92-CV-0603, 1992 U.S. Dist. LEXIS 5315 (E.D. Pa. Apr. 21, 1992).

⁵⁴ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 62.

⁵⁵ *Harrison*, 1992 U.S. Dist. LEXIS 5315, at *2.

⁵⁶ *Id.* at *2-3.

⁵⁷ *Shaw I*, 509 U.S. 630, 642 (1993).

zarre,” and “unexplicable on grounds other than race.”⁵⁸ The Georgia congressional district in *Miller v. Johnson*⁵⁹ was declared a “monstrosity” by the Almanac of American Politics.⁶⁰ The revised North Carolina district in *Shaw II*⁶¹ was described by the trial court as “highly irregular and geographically non-compact by any objective standard that can be conceived”⁶² and characterized by Chief Justice Rehnquist as “serpentine.”⁶³ The Texas redistricting plan under attack in *Bush v. Vera*⁶⁴ was dubbed “among the worst in the Nation” in terms of compactness and regularity of shape, in a well-respected 1993 scholarly study.⁶⁵

The above Supreme Court cases exposed a counter-productive pattern by which state legislatures and redistricting bodies cast traditional reapportionment principles to the wind in order to stretch, twist, and distort ordinary boundary lines for the express purpose of putting unnatural conglomerations of minority voters in a single district. These extreme cases undoubtedly resulted, in part, from the states’ legitimate desire to avoid having their plans rejected by the Justice Department, particularly in the South where preclearance was required under Section 5 of the Voting Rights Act. States also feared costly, unpleasant litigation with the NAACP and other minority organizations under Section 2 of the Act.⁶⁶ Yet the result was one that frequently exalted race over all other factors and yielded unsightly, freakish districts that did not necessarily advance minority rights in a society increasingly seeking a race-neutral base line.⁶⁷

At the same time, the subtext that began creeping into those Supreme Court opinions invalidating extreme districts and the scholarly commentary that grew up around them were equally troublesome. One new theme that developed in the mid and late-1990’s was that racial considerations and reapportionment might be mutually exclusive. The subtle message became that it was illegitimate (as a general

⁵⁸ *Id.* at 644.

⁵⁹ 515 U.S. 900 (1995).

⁶⁰ *Id.* at 909.

⁶¹ 517 U.S. 899 (1996).

⁶² *Id.* at 905-06.

⁶³ *Id.* at 906.

⁶⁴ 517 U.S. 952 (1996).

⁶⁵ *Id.* at 960 (citing Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 571-73 tbl. 6 (1993)). Some members of the Court, however, took the position that the bizarre-shaped districts were primarily the result of political considerations, not racial factors. See, e.g., *Bush*, 517 U.S. at 1003-04 (Stevens, J., dissenting).

⁶⁶ For a discussion of the interplay of Sections 2 and 5 of the Act, see *infra* note 129.

⁶⁷ For one critique of this “maximization” approach, see MAURICE T. CUNNINGHAM, *MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING AND THE DEPARTMENT OF JUSTICE* 157-59 (2001).

rule) to consider race as a factor in creating reapportionment maps, even in order to protect and ensure fairness to racial minorities.⁶⁸

This sort of "no racial considerations allowed" approach is constitutionally hazardous and politically impractical. First, it ignores the fact that, when considering the dictates of one-person-one-vote in a racial context, both the Fourteenth and Fifteenth Amendments come into play. This produces a double-barreled constitutional command, which requires careful footwork by the courts in order to avoid being shot in the leg by either. Although Fourteenth Amendment jurisprudence has generally moved towards a concept of absolute race neutrality and the imposition of strict scrutiny whenever governmental classifications are based upon race, even for the presumed benefit of racial minorities,⁶⁹ the law is not nearly as cut-and-dry in the reapportionment sphere. Unlike traditional equal protection claims involving other forms of governmental conduct, "electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population."⁷⁰ This is true because the Fifteenth Amendment and the Voting Rights Act place unique, affirmative responsibilities upon states to correct past patterns of injustice with respect to minority voting.

Significantly, the thresholds for establishing violations of the Voting Rights Act are quite different than those under the Fourteenth Amendment. Rather than requiring proof of intentional discrimination, which is the ordinary standard in Fourteenth Amendment equal protection jurisprudence,⁷¹ the Voting Rights Act was specifically amended by Congress in 1982 to make clear that its protections were triggered based upon mere discriminatory *results*,⁷² a much easier standard for plaintiffs to establish. Thus, the "no racial considerations allowed" notion places reapportionment bodies in an impossible position. On the one hand, these bodies must be cognizant of the Fifteenth Amendment and the Voting Rights Act, which place upon them an obligation to safeguard the voting rights of minority citizens. On the other hand, the "no racial considerations allowed" notion suggests that reapportionment officials should be prepared to walk into court and swear that they did not affirmatively take race into account. Such an inconsistent set of commands ends up paralyzing state legislatures and apportionment bodies. It leads to disingenuity and, in certain instances, outright deception by voting rights

⁶⁸ *Bush*, 517 U.S. at 999-1000, 1002-03 (Thomas, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 904-05 (1995); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). See also *Jones*, *supra* note 7.

⁶⁹ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷⁰ *Shaw I*, 509 U.S. at 680 (Souter, J., dissenting).

⁷¹ See, e.g., *Washington*, 426 U.S. at 229, *Arlington Heights*, 429 U.S. at 252.

⁷² See discussion *supra* notes 22-29 and accompanying text.

lawyers and their clients. It also leads to puzzling Supreme Court decisions that fail to create workable standards for those in the thick of reapportionment travails.

Second, the “race may not be considered” approach is premised upon a false assumption that compliance, or non-compliance, with the Voting Rights Act and the Fifteenth Amendment is a one-shot deal that only justifies consideration of racial fairness when a violation of those provisions has been definitively proven. Such a rigid view of how voting rights are safeguarded is off the mark. Compliance with the Voting Rights Act, and with the Fifteenth Amendment which undergirds it, is necessarily an ongoing, incremental process. The goal cannot be to wait until districts drift into skewed, illegal, racially-imbalanced configurations over time, which is what occurred during the first hundred years after the adoption of the Reconstruction-era Fifteenth Amendment. The goal cannot be to wait until plaintiffs sue the reapportionment body and conclusively prove violations of the three *Gingles* pre-conditions (a fairly easy task in most urban areas, as any voting rights expert will confirm) and the “totality of the circumstances” test (a more elusive, imprecise hurdle) before allowing redistricting bodies to ponder issues of fairness to minority groups. Rather, compliance with the Fifteenth Amendment and the Voting Rights Act, which Congress enacted pursuant to its broad enforcement provisions under that Amendment, require constant vigilance. Reapportionment bodies must constantly be on the alert to ensure that lines are being drawn around racial minorities with the same fairness and consistency as applies to all other citizens. Had the Commission Chairman not consciously and intentionally taken race into account in constructing districts in Pennsylvania that were reflective of the interests of minorities a decade ago, nod-and-wink politics and the subtle maneuvering of district lines behind closed doors would have taken race into account in the opposite fashion, i.e., to intentionally produce districts *unfair* to African-Americans and Latinos.

The Court’s new portfolio of post-*Gingles* reapportionment cases, beginning with *Shaw v. Reno* in 1993, has been sensible in its overall theme. Creating districts in which geographically-distant minorities who have little in common other than skin color are lumped together, simply for the sake of creating majority-minority districts wherever mathematically possible, would have accomplished little in furtherance of voting rights in the United States, even if such districts had survived. In the words of Justice O’Connor in *Shaw I*, extreme forms of racial gerrymandering in redistricting pose a serious danger of “balkaniz[ing] us into competing racial factions; it threatened to

carry us further from the goal of a political system in which race no longer matters”⁷³ Or, as Justice Kennedy correctly noted in *Miller v. Johnson*,⁷⁴ the noble end envisioned by the Framers of the Fifteenth Amendment and the Voting Rights Act “[was] neither assured nor well served . . . by carving electorates into racial blocs.”⁷⁵ At the very least, the strained construction of such districts creates the public perception of crass racial gerrymandering, which is not particularly healthy for a society seeking to move away from that history.

All concerned were wrong in embarking upon this course of maximizing minority districts in order to accomplish self-interested political objectives. Both political parties sought to extract advantage from this approach, but it did not necessarily serve the best interests of any of those whose rights were at stake.⁷⁶ Yet the “race as a predominant factor” test introduced by *Miller* to correct this dysfunction has drifted into inconsistent corridors, creating confusion and encouraging dishonesty among lower courts and legislators charged with decoding it. The lingering suggestion that *all* intentionally created majority-minority districts are bad, undesirable, and forbidden by the Constitution, is equally non-productive. The secret to giving the “predominant factor” test sharper and more useful boundaries is, as a first step, to reconcile the separate commands of the Fourteenth and Fifteenth Amendments.

III. THE DISTINCT ORIGINS OF ONE-PERSON-ONE-VOTE AND VOTING RIGHTS CASES

A. *One-Person-One-Vote and the Fourteenth Amendment*

Lawyers, legal scholars, and interested observers at times suggest that the landmark decisions that established the foundation of modern reapportionment theory in the early 1960’s—*Baker v. Carr* and *Reynolds v. Sims*—were directly or indirectly designed to accomplish

⁷³ *Shaw I*, 509 U.S. at 657.

⁷⁴ 515 U.S. 900 (1995).

⁷⁵ *Id.* at 927.

⁷⁶ For an interesting example of how politics has driven these racial redistricting battles to the bitter end, notwithstanding claims by both political parties that they supported the true interests of racial minorities, see *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 920 (1996) (Stevens, J., dissenting) (describing how Republicans originally supported the creation of additional minority districts in North Carolina, which Democrats opposed, because they favored Republican party interests). When the Democratic plans to create additional minority seats prevailed, however, the Republicans opposed these plans and became plaintiffs in the *Shaw* lawsuit. Thus, from the start, political interests have driven the struggle for both parties, rather than unyielding concerns for creating new minority districts.

racial equality in voting.⁷⁷ This, however, is a faulty reconstruction of history.

Baker and *Reynolds* had little to do with securing black citizens the right to vote, except incidentally. The push for the Court to enter the reapportionment thicket and straighten out the gross inequities that had developed in state and congressional apportionment maps around the country in the 1950's, revolved almost entirely around urban-rural party politics and federalism issues rather than race. One of the earliest pieces of legal scholarship advocating that federal courts jump into the reapportionment quagmire was authored by Anthony Lewis, then a young reporter for the *New York Times* who covered the Supreme Court. Lewis, who had been a Nieman Fellow at Harvard Law School, wrote in the *Harvard Law Review*⁷⁸ that the federal judiciary should foreswear Justice Felix Frankfurter's logic articulated in the 1946 decision of *Colegrove v. Green*.⁷⁹ In that case, Justice Frankfurter had taken the intractable position that any existing inequities in voting, resulting from failures to reapportion, amounted to a political malady that only the legislative branch was constitutionally authorized to correct.⁸⁰ "Courts ought not to enter this political thicket," Frankfurter wrote. "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."⁸¹

Lewis's counter to that argument sounded a theme that was gaining increasing popularity in the legal literature in the late 1950's: the federal courts were the only hope for correcting those injustices that had run rampant after decades of failures to reapportion by state legislative bodies.⁸² During the period of rapid urbanization in the United States since World War II, the political equilibrium had been frozen in place, protecting the interests of those in power, who were primarily located in rural areas. It was only the judicial branch, Lewis argued, that was in a position to re-configure the equation and restore the soul of the Fourteenth Amendment, in order that every citizen's right to vote count equally. Lewis wrote: "The federal courts

⁷⁷ See, e.g., Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1830-32 (1997) (combining an analysis of the *Shaw* line of cases with the *Baker* and *Reynolds* line of cases from the early 1960's).

⁷⁸ Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).

⁷⁹ 328 U.S. 549 (1946).

⁸⁰ Justice Frankfurter's opinion, on this particular issue, spoke for only three of the seven Justices who participated in that decision. A fourth Justice, Justice Rutledge, concurred in the result. *Colegrove*, 328 U.S. at 564.

⁸¹ *Id.* at 556.

⁸² Lewis, *supra* note 78, at 1095-96.

cannot remake politics. But they can be a conscience, expressing ideas which take root in public and political opinion."⁸³

When *Baker v. Carr* wound its way onto the Supreme Court docket in 1962⁸⁴ for a second round of briefs and arguments, it was very much on the radar screen of the Kennedy Justice Department. Yet this attention was not because of any "racial equality" implications. While serving as Senator from Massachusetts, President John F. Kennedy had taken a strong position in favor of correcting injustices in state apportionment schemes in a 1958 piece for the *New York Times Magazine*.⁸⁵ Then-Senator Kennedy had written: "[T]he apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled."⁸⁶ In addition, Attorney General Robert F. Kennedy, who made the decision after taking office to support the plaintiffs in the reapportionment cases, had managed his brother's national Presidential campaign. He had seen first-hand how the gross imbalances in state legislative apportionment maps had hurt urban areas, which constituted prime Democratic turf.⁸⁷ Looking ahead to the 1964 Presidential election, RFK was determined to straighten out this political inequity. Anthony Lewis, a close personal friend of Robert Kennedy from Harvard undergrad days, added momentum by lobbying the young Attorney General in favor of the positions set forth in his *Harvard Law Review* piece.⁸⁸

Neither Solicitor General Archibald Cox, who argued *Baker* and *Reynolds* in the Supreme Court on behalf of the United States, nor Burke Marshall, who served as the head of the Civil Rights Division in the Kennedy Justice Department, viewed these cases through a "racial equality" lens.⁸⁹ Indeed, they would later point out that when those

⁸³ *Id.* at 1098. For other legal commentary in the pre-*Baker* period, which made clear that the central issue in the reapportionment debate dealt with states' rights, federalism, and the distribution of political power, see William L. Taylor, *Legal Action To Enjoin Legislative Malapportionment: The Political Question Doctrine*, 34 S. CAL. L. REV. 179 (1961); Note, *Legislative Apportionment: A Judicial Dilemma?*, 15 RUTGERS L. REV. 82 (1960).

⁸⁴ See *U.S. Asks High Court Review of Tennessee Apportionment*, N.Y. TIMES, Apr. 20, 1961, at 25.

⁸⁵ John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 18. See also Oral history interview of Robert F. Kennedy & Burke Marshall, Dec. 4, 1964, at 575 (transcript on file with the John F. Kennedy Library).

⁸⁶ Kennedy, *The Shame of the States*, *supra* note 85, at 37.

⁸⁷ See KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 164 (1997) [hereinafter GORMLEY, ARCHIBALD COX].

⁸⁸ Oral History Interview with Archibald Cox at 18-5, 18-6 (1990) (Harvard Law School Library Special Collections).

⁸⁹ For a discussion of Cox's role in grappling with and agonizing over the complex reapportionment issues, see GORMLEY, ARCHIBALD COX, *supra* note 87, at 163-70, 171-77 (discussing *Baker v. Carr* and *Reynolds v. Sims*). Shortly after *Baker* was decided, Cox wrote a piece for the *American Bar Association Journal* reflecting upon the importance of that Supreme Court decision

two landmark cases were fought to a conclusion in the Supreme Court, racial minorities were still routinely disenfranchised in the United States, particularly in the South, through poll taxes, literacy tests, and other forms of overt discrimination.⁹⁰ Thus, until the Voting Rights Act of 1965 was enacted—after the assassination of President Kennedy—the notion of equalizing the right to vote for racial minorities was not a realistic one. Racial considerations had little to do with the evolution of the “one-person-one-vote,” principle under the Fourteenth Amendment.⁹¹ As Cox would later summarize: “I don’t think [race] was the impetus or the dominant thought. Obviously, we were aware that there would be some racial implications in some cases. But that certainly wasn’t our focus.”⁹²

B. Minority Rights: The Fifteenth Amendment

It is important to note, however, that there existed a small pocket of jurisprudence under the Fifteenth Amendment, even before the 1960’s, that dealt with the most egregious instances of denying blacks the right to vote in state and federal elections. Section One of the Fifteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁹³ Section Two of that Reconstruction-era Amendment authorizes Congress to enforce the provision by “appropriate legislation.”⁹⁴

In the late nineteenth-century cases *United States v. Reese*⁹⁵ and *Ex Parte Yarbrough*,⁹⁶ the Supreme Court broadly interpreted the rights

in ensuring a sense of public confidence in the American political system. See Archibald Cox, *Current Constitutional Issues*, 48 A.B.A. J. 711 (1962). For a glimpse of the Justice Department’s view of the significance of *Baker*, generally, it is worth reading the “Law Day” Speech of Nick Katzenbach, Robert Kennedy’s Deputy Attorney General, delivered at Vanderbilt University School of Law. Nicholas deB. Katzenbach, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829 (1962). Katzenbach’s speech focuses on federal-state relations, as well as the importance of state legislatures adhering to the Supreme Court pronouncement and voluntarily carrying out redistricting.

⁹⁰ GORMLEY, ARCHIBALD COX, *supra* note 87, at 164, 497 n.16.

⁹¹ It is noteworthy that in a major symposium in the *Yale Law Journal* in 1962, published immediately following the Court’s decision in *Baker v. Carr*, a parade of prominent legal scholars and political science experts commented upon the significance of that landmark decision. These included such notables as political scientist E.E. Schattschneider; Yale Law Professors Charles L. Black, Alexander M. Bickel, Thomas I. Emerson, and Louis H. Pollak; and attorney (later Justice) Arthur L. Goldberg. In this hundred-page symposium issue, there was virtually no discussion of racial issues as they related to reapportionment. See *A Symposium on Baker v. Carr: Urbanization and Reapportionment*, 72 YALE L.J. 7 (1962).

⁹² Interview with Archibald Cox (Jan. 29, 2002) (on file with author).

⁹³ U.S. CONST. amend. XV, § 1.

⁹⁴ U.S. CONST. amend. XV, § 2.

⁹⁵ 92 U.S. 214 (1875) (mem.).

protected by the Fifteenth Amendment and Congress's ability to enforce them. In *Reese*, Chief Justice Waite stated that the newly-ratified Fifteenth Amendment "has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of color."⁹⁷ In *Yarbrough*, the Court declared: "The exercise of the right [under the Fifteenth Amendment] . . . is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary."⁹⁸

In the early twentieth century, the Supreme Court in *Guinn v. United States*⁹⁹ invalidated a 1910 amendment to the Oklahoma Constitution, which required a literary test for those registering and voting in elections, but exempting "lineal descendants" of Oklahoma citizens entitled to vote before January 1, 1866. This provision effectively "grandfathered in" whites, but excluded blacks since they could not vote in 1866. The Supreme Court struck down this amendment as violative of the Fifteenth Amendment. Chief Justice White, writing for the Court, stated that "to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment [did not have] the self-executing power which it has been recognized to have from the beginning"¹⁰⁰ In a related case, *Lane v. Wilson*,¹⁰¹ the Court invalidated an Oklahoma statute that established a complex voter registration scheme which sought to make it difficult for blacks to vote after the "grandfather clause" was declared unconstitutional. Justice Frankfurter, writing for the Court in *Lane*, specifically premised his decision on the Fifteenth Amendment. He emphasized that that the Reconstruction-era Amendment "nullifies sophisticated as well as simple-minded modes of discrimination."¹⁰²

In the 1940's, the Court again relied upon the Fifteenth Amendment in protecting minority voting rights. In *Schnell v. Davis*,¹⁰³ the Supreme Court in a per curiam opinion invalidated the discriminatory application of voting tests, relying on both the Fourteenth and

⁹⁶ 110 U.S. 651 (1884) (denying the habeas corpus petitions of Jasper Yarbrough and seven other persons who had been convicted of conspiring to interfere with an African-American man voting in Georgia).

⁹⁷ *Reese*, 92 U.S. at 218.

⁹⁸ *Ex parte Yarbrough*, 110 U.S. at 665.

⁹⁹ 238 U.S. 347 (1915).

¹⁰⁰ *Id.* at 363.

¹⁰¹ 307 U.S. 268 (1939).

¹⁰² *Id.* at 275.

¹⁰³ 336 U.S. 933 (1949) (per curiam).

Fifteenth Amendments.¹⁰⁴ In another landmark case, *Smith v. Allwright*,¹⁰⁵ the Supreme Court invalidated the practice of white primaries, squarely resting on the Fifteenth Amendment. In *Allwright*, the Court knocked down a scheme by which the Democratic party in Texas prohibited Negroes from voting in a primary election for candidates for U.S. Senate, House, Governor, and other state officers. The Court wrote: "Here we are applying . . . the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a State of a citizen's right to vote."¹⁰⁶

One of the most relevant cases, *Gomillion v. Lightfoot*,¹⁰⁷ decided in 1960, squarely tackled the issue of racial gerrymandering in the voting context, relying upon the Fifteenth Amendment. *Gomillion* involved an Alabama statute that intentionally re-drew the boundaries of the city of Tuskegee, "from a square to an uncouth twenty-eight-sided figure," in such a way as to exclude virtually all qualified Negro from voting in city elections.¹⁰⁸ The federal district court dismissed the complaint on the ground that it presented a "political question" that was not subject to judicial review. The Supreme Court reversed, concluding that if the plaintiffs could prove that the Alabama statute discriminated against Negro voters in redefining the city's boundaries, they could make out a claim for denial of their right to vote under the Fifteenth Amendment.¹⁰⁹ The Court specifically distanced itself from the thorny "political questions" issue that was swirling around the Fourteenth Amendment Equal Protection Clause at that time. Rather, the Court emphasized that this case indicated an alleged abridgement of the quite distinct Fifteenth Amendment right to vote, based upon race.¹¹⁰ The Court wrote: "The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."¹¹¹

¹⁰⁴ See *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949).

¹⁰⁵ 321 U.S. 649 (1944). See also *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating efforts by the Jaybird Party in Texas—which did not permit Negroes to join—to circumvent *Smith* by establishing its own primaries).

¹⁰⁶ *Smith*, 321 U.S. at 666.

¹⁰⁷ 364 U.S. 339, 340 (1960).

¹⁰⁸ The statute changed the city, in shape, from a rectangle to a twenty-eight sided figure. As a result, all but four or five Negro voters were drawn out of the city's new boundaries. *Id.* at 348. See generally *Recent Cases, Constitutional Law—State Power To Realign Political Subdivisions Held Limited by Fifteenth Amendment*, 109 U. PA. L. REV. 1173 (1961).

¹⁰⁹ *Gomillion*, 364 U.S. at 346.

¹¹⁰ *Id.* at 343, 345.

¹¹¹ *Id.* at 346.

In *Gomillion*, Justice Frankfurter warned that the Fifteenth Amendment should not be taken out of play simply because redistricting was at issue: "The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." Frankfurter concluded: "It is inconceivable that guarantees embedded in the Constitution of the United States may be manipulated out of existence."¹¹²

C. *The Voting Rights Act Is Born (1965)*

Even before the civil rights movement of the 1960's, there existed a small but sturdy body of case-law under the Fifteenth Amendment, that struck down the most egregious efforts to eliminate, or burden, the ability of blacks to vote. But the unique jurisprudence ensuring equal voting rights to minorities did not solidify until the adoption of the Twenty-Fourth Amendment in 1964,¹¹³ which banned poll taxes in elections for federal officials, and the enactment of the Voting Rights Act in 1965.

Early attempts at curbing abuses with respect to racial discrimination in the arena of voting, via statute, sputtered and failed during the Kennedy Administration.¹¹⁴ As discussed above, there were a handful of significant Supreme Court decisions over the years that sought to correct overtly discriminatory voting practices by applying the Fifteenth Amendment. At the same time, there were even more instances in which the Supreme Court deferred to the states when it came to voting practices that were blatantly discriminatory. Thus, in *Breedlove v. Suttles*,¹¹⁵ the Supreme Court unanimously upheld a Georgia statute requiring the payment of a one dollar poll tax as a prerequisite for voting (designed, obviously, to discourage blacks from casting votes). The Court in *Breedlove* rejected challenges under the

¹¹² *Id.* at 345 (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926)).

¹¹³ The Twenty-Fourth Amendment provides in relevant part: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1.

¹¹⁴ For a discussion of one unsuccessful piece of Kennedy Administration legislation that sparked controversy, in seeking to forbid certain literacy tests (at a level above a sixth-grade education) as a prerequisite for voting, see William W. Van Alstyne, *The Administration's Anti-Literacy Test Bill: Wholly Constitutional but Wholly Inadequate*, 61 MICH. L. REV. 805 (1963).

¹¹⁵ 302 U.S. 277 (1937). *Breedlove* was overruled by *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). In *Harper*, the Court invalidated a Virginia statute that required payment of a poll tax of up to \$1.50, as a prerequisite to voting, finding this to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, based upon the notion that the right to vote was a "fundamental" one.

Fourteenth and Nineteenth Amendments, without ever addressing the Fifteenth Amendment issues. It concluded that “[l]evy by the poll has long been a familiar form of taxation,” and found no conflict with the U.S. Constitution.¹¹⁶ In 1959, in *Lassiter v. Northampton County Board of Elections*,¹¹⁷ the Court unanimously upheld a North Carolina statute requiring a literacy test, i.e., the reading and writing of selected lines from the state constitution, as a prerequisite to voting—another tried-and-true discriminatory tool. The Court in *Lassiter* found that a literacy test, “on its face,” did not “perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.”¹¹⁸

Thus, in the pre-1960’s jurisprudence, the cases relating to race discrimination in voting were a mixed bag. A few cases, from *Reese* to *Gomillion*, addressed extreme abuses, relying almost exclusively upon the Fifteenth Amendment.¹¹⁹ In many other cases, however, the Court simply averted its judicial eyes, allowing states to continue inequitable practices.

As serious abuses persisted, it became clear that such racial voting-rights problems had to be handled quite distinctly from the “one-person-one-vote” issue. It also became inescapable, by the 1960’s, that Congress would have to enter the fray. The history, if one examined the record in the United States, was abysmal. Immediately after the Civil War, for instance, Mississippi had isolated the bulk of its black population in a “shoe-string” congressional district running the length of the Mississippi River, leaving five other districts with white majorities¹²⁰ and effectively boxing Negroes out of the political process. One hundred years later, things were not much better. In a large number of voting districts, particularly in the South, state and local authorities continued to engage in overtly-discriminatory practices such as ballot box stuffing, property requirements, poll taxes (the “most effective bar to Negro suffrage ever devised”),¹²¹ white primaries, at-large elections, runoff requirements, and other devices specifically designed to restrict or squelch entirely the right to vote of minority citizens.¹²²

¹¹⁶ 302 U.S. at 281.

¹¹⁷ 360 U.S. 45 (1959).

¹¹⁸ *Id.* at 53.

¹¹⁹ As Archibald Cox would recall, in describing his early years as Solicitor General in the Kennedy Administration: “I don’t think we were talking about a Voting Rights Act yet. The assumption was that the government still had to proceed jurisdiction by jurisdiction, or if possible state by state, to deal with discrimination of that sort.” Interview with Archibald Cox (Jan. 29, 2002) (on file with author).

¹²⁰ E. FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* 590 (1988).

¹²¹ A. SYONE, *STUDIES IN THE AMERICAN RACE PROBLEM* 354-55 (1908).

¹²² See generally J.M. KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

There was some scholarly discussion, post-*Reynolds*, as to whether the one-person-one-vote principle of the Fourteenth Amendment might be extended to challenge multi-member electoral districts, which existed in most states and inevitably disfavored minority groups.¹²³ Yet this movement never took off. It was really not until the adoption of the Voting Rights Act in 1965, grounded directly upon the Fifteenth Amendment, that this distinct area of constitutional jurisprudence involving minority voting rights began to take root.

Many of the same individuals who had guided *Baker* and *Reynolds* through the Supreme Court, played pivotal roles in shaping voting rights legislation. By this time, in the mid-1960's, registration of black voters ran nearly fifty percent behind that of white voters in some states due to racially discriminatory voting practices.¹²⁴ Black legislators were nearly never elected, particularly in the South, because such voting practices effectively prevented blacks from electing candidates of choice.

Nicholas Katzenbach, who succeeded Robert Kennedy as Attorney General, took the lead in drafting new legislation in the early months of 1965, as the Johnson Administration sought to define itself.¹²⁵ Katzenbach enlisted Solicitor General Cox to take a stab at fashioning a statute that would withstand constitutional challenge in the Supreme Court. Katzenbach also re-enlisted Burke Marshall, who had left the Justice Department after RFK's departure, to work as a consultant on this special piece of legislation.¹²⁶ This first piece of major voting rights legislation since Reconstruction did not rely on the generic guarantee of "equal protection" contained in the Fourteenth Amendment that had formed the underpinning for the "one-person-one-vote" cases. Rather, it was anchored upon the more specific provision of the Fifteenth Amendment, which prohibited the states from "denying" or "abridging" the right to vote based upon race.

One distinguishing feature of the Voting Rights Act, as it came together in early drafts, was that it switched the presumption against states with a history of discrimination. Rather than placing the burden upon individual plaintiffs—who typically possessed insufficient resources to launch expensive and complex civil rights cases—the

¹²³ For early scholarly discussion of this issue, which continued to rear its head for decades, see Malcolm E. Jewell, *Minority Representation: A Political or Judicial Question*, 53 KY L.J. 267 (1965); John F. Banzhaf III, *Multi-Member Electoral Districts: Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

¹²⁴ See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

¹²⁵ GORMLEY, ARCHIBALD COX, *supra* note 87, at 190. President Johnson had announced in his State of the Union address in January of 1965 that he would immediately send a refurbished Voting Rights Act to Congress, although he had no such legislation in place.

¹²⁶ GORMLEY, ARCHIBALD COX, *supra* note 87, at 190-91.

United States government was permitted (under Section 4 of the Act) to *presume* that literacy tests, poll taxes and other suspect devices were designed to discriminate against black voters in those states that had a history of excluding minorities from polling places.¹²⁷ As the Court explained in *South Carolina v. Katzenbach*: "After enduring nearly a century of resistance to the Fifteenth Amendment, Congress . . . decided to shift the advantage of time and inertia from the perpetrators of the evil to its victims."¹²⁸ Thus, Section 5 of the Act required states with histories of discriminatory voting practices to preclear any changes in such practices with a three-judge federal court or the Attorney General of the United States.¹²⁹ Using the powerful provisions of Sections 4 and 5, it became easier for the government to police voting-rights abuses in states with poor track records. In constructing those portions of the Act, Congress explicitly recognized that certain subtle discriminatory practices had the effect of "undo[ing] or defeat[ing] the rights recently won by nonwhite voters."¹³⁰ Moreover, in conjunction with Section 2 of the Act, which applied more broadly to all states (and later evolved into a key provision of the Act), Congress chose to exercise its enforcement powers under the Fifteenth Amendment in an "inventive" and expansive fashion,

¹²⁷ *Id.* In other words, a low percentage of voter turnout combined with a suspect device such as a "literacy test" or a "poll tax" would trigger a presumption that the state in question had intentionally denied citizens the right to vote based upon race. For a complete text of the Act as originally adopted, see *Katzenbach*, 383 U.S. at 337 (Appendix to Opinion of the Court).

¹²⁸ 383 U.S. at 328.

¹²⁹ Section 5 of the Voting Rights Act required certain state and local governments "covered" by the Act to obtain "preclearance" from the U.S. Department of Justice or the U.S. District Court for the District of Columbia before any changes in voting standards, practices, or procedures could be made. 42 U.S.C. § 1973(c). Initially, the preclearance requirements were placed on only a small number of jurisdictions that had maintained literacy tests and other forms of blatant discrimination in voting qualifications as of the presidential election of 1964. However, subsequent amendments in 1970, 1975, and 1982 expanded the reach of the Voting Rights Act. By the time the 1990 decennial census arrived, twenty-two states or parts of states were covered by Section 5 preclearance requirements. NATIONAL CONFERENCE OF STATE LEGISLATORS, REAPPORTIONMENT LAW: THE 1990'S 42-44 (1989); GORMLEY, REAPPORTIONMENT, *supra* note 5, at 37. The remaining states (including Pennsylvania) which lacked a history of overt discrimination in voting practices, were excused from preclearance. Yet they still fell within the broader ambit of Section 2 of the Voting Rights Act. This provision, as amended, prohibits any state or political subdivision from imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or status as a member of a minority group. 42 U.S.C. § 1973(a). For a general discussion of the Voting Rights Act, see BERNARD GROFMAN & CHANDLER DAVIDSON, CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (1992); GROFMAN, MINORITY REPRESENTATION, *supra* note 26; HUDSON, *supra* note 12.

¹³⁰ H.R. Rep. No. 91-397, at 8 (1969).

giving minority plaintiffs ample latitude to prevail where evidence indicated that their right to vote had been diluted.¹³¹

The Voting Rights passed overwhelmingly in both the House and the Senate.¹³² As Chief Justice Warren explained in *Katzenbach*: "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."¹³³

Cox defended the Voting Rights Act with ease, in the seminal Supreme Court case of *South Carolina v. Katzenbach*.¹³⁴ There, the Court recognized that Section 5 was a constitutionally necessary and justifiable response to certain states' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."¹³⁵ As the Court later explained in *Beer v. United States*,¹³⁶ Congress had legitimately exercised its broad power under the Fifteenth Amendment "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."¹³⁷ The Voting Rights Act was thus the first modern embodiment of Congress's enforcement power under the Fifteenth Amendment.¹³⁸ As Chief Justice Warren wrote in *Katzenbach*: "After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshaled an array of potent weapons against the evil We here hold that the portions of the Voting

¹³¹ 383 U.S. at 327. The original version of Section 2 was cast in general terms that closely tracked the language of the Fifteenth Amendment, prohibiting any voting qualification, standard, or procedure that "denied or abridged the right of any citizen of the United States to vote on account of race or color." *Id.* at 338. Thus, Section 2 was rarely employed in voting rights litigation until the 1982 amendments to the Act created a more specific cause of action. A violation of Section 2 can now be established under the amended Act if "based on the totality of the circumstances," minority voters can prove that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

¹³² 383 U.S. at 309. The House approved the bill by a vote of 328 to 74. The measure passed the Senate by a margin of 79 to 18. *Id.*

¹³³ *Id.*

¹³⁴ 383 U.S. 301 (1966). By the time the South Carolina case was argued, Archibald Cox had left the Solicitor General's office and had returned to his teaching position at Harvard Law School. Attorney General Katzenbach appointed Cox to appear as a Special Assistant Attorney General to argue the case, along with Katzenbach, in the Supreme Court. GORMLEY, ARCHIBALD COX, *supra* note 87, at 199.

¹³⁵ 383 U.S. at 335.

¹³⁶ 425 U.S. 130 (1976).

¹³⁷ *Id.* at 140 (quoting H.R. Rep. No 94-196, at 57-58 (1975) (citations omitted)).

¹³⁸ 383 U.S. at 309-11, 325-27, 337. For a general discussion of the Voting Rights Act, see GROFMAN & DAVIDSON, *supra* note 129; GROFMAN, MINORITY REPRESENTATION, *supra* note 26; HUDSON, *supra* note 12.

Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.”¹³⁹

IV. THE FOURTEENTH AND FIFTEENTH AMENDMENTS MERGE IN VOTING CASES

If one examines the evolution of case-law leading up to modern voting rights decisions, it is not difficult to identify where the confusion began. What one discovers, in isolating those relatively obscure cases in which the Fourteenth and Fifteenth Amendment vied for attention after the initial burst of voting rights activity in the early 1960's, is that the Supreme Court innocently created a creature as unattractive as the mythical gerrymander. Quite unintentionally, the Court dumped the Fourteenth and Fifteenth Amendments into a single constitutional pool and then failed to fish them out and give them independent roles or identities.

The Court tended to favor the Fourteenth Amendment, early on, for reasons that can largely be traced to historical accident. First, the Court had recently decided cases like *Baker* and *Reynolds*, utilizing the Equal Protection Clause to deal with inequalities in voting. After those decisions, states across the country scrambled to comply with the Equal Protection Clause and to construct legislative districts of as nearly equal population as “practicable.”¹⁴⁰ The Fourteenth Amendment dominated their attention. Second, the Court had located the fundamental “right to vote” in the folds of the Fourteenth Amendment, in the somewhat anomalous case of *Harper v. Virginia State Board of Elections*,¹⁴¹ during a period in which the Court experimented with linking fundamental rights to the Equal Protection Clause, in order to avoid the bugaboo of “substantive due process” that had been repudiated after *Lochner v. New York*.¹⁴² Third, before Congress amended the Voting Rights Act in 1982, the Fourteenth and Fifteenth Amendments were briefly interpreted in lockstep. For several years, the Court required proof of discriminatory “intent” under both provisions, which made them virtually interchangeable. As a result of the above factors, the voting rights cases churned together the Four-

¹³⁹ 383 U.S. at 337.

¹⁴⁰ *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

¹⁴¹ 383 U.S. 663 (1966).

¹⁴² 198 U.S. 45 (1905). In *Harper*, the Court in 1966 had found the “right to vote” implicit in the Equal Protection Clause, rather than the Due Process Clause. This was during a phase in which the Court stretched to locate fundamental rights within the Equal Protection Clause, rather than the more logical due process language, so that it was not accused of re-inventing the discredited substantive due process of the *Lochner* era. See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 972-73 (1997). This caused the Court to over-emphasize equal protection analysis, generally, in voting rights cases. See *id.*

teenth and Fifteenth Amendments, quite accidentally. Often, the Fourteenth Amendment was emphasized out of habit.

Moreover, redistricting exercises in the 1960's and 1970's were necessarily focused much more on complying with the one-person-one-vote edict, under the Fourteenth Amendment, than with race issues under Fifteenth Amendment and the Voting Rights Act. States had begun the considerable task of overhauling apportionment schemes that had fallen into gross imbalance, after decades of often intentional neglect.¹⁴³ These decades were, therefore, largely devoted to finding acceptable ranges of population deviation when it came to carving out legislative districts.¹⁴⁴ Sporadic cases involving race and redistricting made their way onto the Supreme Court's docket. Increasingly, however, the Court's references to the Fourteenth and Fifteenth Amendments and the Voting Rights Act became jumbled together.

In the 1964 decision *White v. Rockefeller*,¹⁴⁵ predating the Voting Rights Act, the Court rejected a challenge to a congressional redistricting scheme by blacks and Puerto Ricans in New York City, who alleged that they had been packed into a non-white district. The

¹⁴³ Pennsylvania's experience was quite typical. In March of 1962, the same month that *Baker v. Carr* was handed down, a group of Pennsylvania voters sued the Secretary of the Commonwealth, seeking to halt that year's elections until the existing apportionment statutes could be re-vamped. *Butcher v. Trimarchi*, 28 Pa. D. & C.2d 537 (Dauphin County Ct. 1962); GORMLEY, REAPPORTIONMENT, *supra* note 5, at 9. Although the Dauphin County Court handling the case declined to block the scheduled elections, it retained jurisdiction while the Pennsylvania Legislature attempted to hammer out new redistricting legislation, which finally occurred in 1963. The plaintiffs then immediately challenged the plan under the Fourteenth Amendment, filing their petition directly with the Pennsylvania Supreme Court. In *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964), the Pennsylvania Supreme Court struck down the reapportionment plan, unanimously holding that it violated the principle of one-person-one-vote, as articulated in *Reynolds*. It mandated that the legislature prepare a new reapportionment plan before the 1966 election. The House districts ranged in population from 4,485 to 81,534, while the Senate districts ranged from 129,851 to 352,629 in population. The Court found that this was far from the "substantial equality of population" that *Reynolds* required. *Id.* at 561-67; GORMLEY, REAPPORTIONMENT, *supra* note 5, at 9. When the legislature failed to meet the Court's deadline to properly reapportion the state House and Senate, the state court produced its own redistricting map, seeking to adhere to the "one-person-one-vote" principle as well as to the general tenets of sound reapportionment.

It was largely in response to this messy process, in its first post-*Reynolds* redistricting experience, that Pennsylvania amended its Constitution to create a reapportionment commission, designed to take this sensitive job away from the legislature as body and bring a measure of neutrality to this highly-charged political process. See *Butcher v. Bloom*, 216 A.2d 457, 459 (Pa. 1966). That provision placed the job of redistricting in the hands of a five-person commission, comprised of the four leaders of the House and Senate (majority and minority leaders), plus one neutral chairman selected by that group or (if they failed to reach a consensus) selected by the Pennsylvania Supreme Court. See PA. CONST. art. II, § 17.

¹⁴⁴ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 13; Martin H. Belsky, *Reapportionment in the 1970's—A Pennsylvania Illustration*, 47 TEMP. L.Q. 22, 23 (1973).

¹⁴⁵ 376 U.S. 52 (1964).

Court found that there was no proof of "state contrivance" or "motivation" to segregate based upon race.¹⁴⁶ Thus, the Court identified no violation of the Equal Protection Clause or the Fifteenth Amendment.¹⁴⁷ It reached this conclusion without engaging in detailed discussion of either provision. In *Whitcomb v. Chavis*,¹⁴⁸ the Court in 1970 considered a challenge to a multi-member electoral district in Marion County, Indiana, that plaintiffs alleged diluted the votes of blacks and poor persons living in the "ghetto area." The Court rested heavily on pre-voting rights cases, including *Reynolds v. Sims* and its progeny, to declare that multi-member districts were not "inherently invidious"¹⁴⁹ under the Equal Protection Clause, without squarely addressing the relevance, if any, of the Fifteenth Amendment.¹⁵⁰

The Court in *Allen v. State Board of Elections*,¹⁵¹ a 1969 decision directly premised upon the Voting Rights Act, seemed to breathe an element of life into the Fifteenth Amendment. In a cluster of cases from Mississippi and Virginia, the Court strongly reaffirmed the constitutionality of the Act. The Court specifically recognized that "[t]he Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens."¹⁵² At the same time, the Court drew upon the "one person one vote" principle of *Reynolds* to hold that "[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."¹⁵³ It also cited *Reynolds* for the proposition that the Voting Rights Act "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'"¹⁵⁴ The Court in *Allen* concluded that the Act must be given "the broadest possible scope,"¹⁵⁵ but once again left the constitutional anchor ambiguous.¹⁵⁶

The references to the Fourteenth and Fifteenth Amendments became so interlaced by the 1970's that it often proved impossible to

¹⁴⁶ *Id.* at 58.

¹⁴⁷ *Id.* at 53-54, 56-57.

¹⁴⁸ 403 U.S. 124 (1970).

¹⁴⁹ *Id.* at 160. The Court also relied upon cases such as *Fortson v. Dorsey*, 379 U.S. 433 (1965), which was decided before the Voting Rights Act was enacted. See *Whitcomb*, 403 U.S. at 142.

¹⁵⁰ Only Justice Douglas, in dissent, raised the suggestion that "[o]ur Constitution has a special thrust when it comes to voting" due to the adoption of the Fifteenth Amendment. 403 U.S. at 180 (Douglas, J., dissenting).

¹⁵¹ 393 U.S. 544 (1969).

¹⁵² *Id.* at 556 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 309 (1966)).

¹⁵³ *Allen*, 393 U.S. at 569 (emphasis added).

¹⁵⁴ *Id.* at 566 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1962)).

¹⁵⁵ *Allen*, 393 U.S. at 567.

¹⁵⁶ Justice Harlan, concurring in part and dissenting in part, argued that the proper foundation for the Court's analysis was the Fifteenth Amendment rather than the Fourteenth Amendment equal protection cases. Ironically, Harlan argued that the Fifteenth Amendment should lead to a narrower interpretation of the Voting Rights Act than that endorsed by the majority. *Id.* at 589-91 (Harlan, J., concurring and dissenting in part).

discern which provision the Court was relying upon, if either. On top of this, references to the Voting Rights Act were often thrown in (presumably implicating the Fifteenth Amendment, upon which the Act was premised). From this hodgepodge came a jurisprudential confusion that seeped into the case-law. In the 1973 decision of *White v. Regester*,¹⁵⁷ the Court first upheld one portion of a redistricting plan for the Texas House of Representatives under a simple one-person-one-vote analysis linked to the Equal Protection Clause.¹⁵⁸ The Court went on, however, to invalidate multimember districts in Dallas and Bexar Counties, which plaintiffs alleged “invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives,” employing a different analysis.¹⁵⁹ Using language that would later be incorporated into the Voting Rights Act—linked to the “totality of the circumstances”¹⁶⁰—the Court embraced a broad “results test” under the Voting Rights Act. It affirmed the district court’s findings, which threw out this portion of the Texas redistricting plan, based on “a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district in the light of past and present reality, political and otherwise.”¹⁶¹ Thus, the decision was an amalgam of Equal Protection Clause and Voting Rights Act analysis, with no clear lines of demarcation.

Mobile v. Bolden,¹⁶² in 1980, threw the case-law into increased turmoil. In *Mobile*, a plurality of the Court swung away from the *White v. Regester* “results test” approach. Instead, it declared that an at-large voting system did not amount to unconstitutional vote dilution under the Fourteenth Amendment or the Fifteenth Amendment (via the Voting Rights Act), absent proof that it had been maintained for a discriminatory purpose.¹⁶³ *Mobile* thus seemed to toss Fifteenth Amendment and Voting Rights Act claims directly into the same bin as Fourteenth Amendment decisions, requiring the Voting Rights Act to march in step with then-predominant Fourteenth Amendment case-law.

¹⁵⁷ 412 U.S. 755 (1973).

¹⁵⁸ *Id.* at 764.

¹⁵⁹ *Id.* at 765-69.

¹⁶⁰ *Id.* at 769. The “totality of the circumstances” language employed by Justice White was later incorporated by Congress into Section 2 of the Act when it was amended in 1982.

¹⁶¹ *Id.* at 769-70. The Court stated that: “The plaintiff’s burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” *Id.* at 766 (citing *Whitcomb v. Chavis*, 403 U.S. at 149-50).

¹⁶² 446 U.S. 55 (1980).

¹⁶³ *Mobile*, 446 U.S. at 62.

Again, in *Rogers v. Lodge*,¹⁶⁴ the Court in mid-1982 held that discriminatory intent was “a requisite to a finding of unconstitutional vote dilution” under the Fourteenth and Fifteenth Amendments.¹⁶⁵ The majority of the Court found sufficient proof of discriminatory intent in *Rogers* to establish a violation. Justice Powell, joined by Justice Rehnquist, dissented, citing the Court’s Fourteenth Amendment decision in *Washington v. Davis* and stating firmly: “[T]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”¹⁶⁶ Thus, at least for some members of the Court, the Voting Rights Act and the Fifteenth Amendment dealt only with the right to participate in elections and played no role in vote dilution cases, absent proof of discriminatory intent.

Although *Gingles* was decided in 1986, upholding the 1982 legislative amendments that made clear discriminatory intent was *not* a requirement under the statute,¹⁶⁷ the case-law was never quite untangled. Well into the next decade, the Supreme Court continued to treat the Fourteenth and Fifteenth Amendments as largely interchangeable in the context of voting rights cases. In the 1993 decision of *Voinovich v. Quilter*,¹⁶⁸ for example, the Court addressed a voting rights claim by a group of African-American voters in Ohio who alleged that they had been “packed” into districts with disproportionately large numbers of minority citizens in order to dilute their votes and prevent them from having a larger number of “influence” districts in which they could elect their “candidates of choice.”¹⁶⁹ In rejecting plaintiffs’ Voting Rights Act claim, the Court patched together a hybrid Fourteenth and Fifteenth Amendment analysis, concluding that the plaintiffs had never proven the intentional discrimination that they had alleged, and that the lower court had erred in finding intentional discrimination against black voters.¹⁷⁰ In sweeping the Fifteenth Amendment allegation under the rug, the Court went on to state: “This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any

¹⁶⁴ 458 U.S. 613 (1982).

¹⁶⁵ *Rogers*, 458 U.S. at 621. In *Rogers*, the majority found that the district court did not err in concluding that the at-large election scheme for the Board of Commissioners in Burke County, Georgia, was intentionally discriminatory. *Id.* at 622. The Court focused on the Equal Protection Clause of the Fourteenth Amendment in its analysis.

¹⁶⁶ *Id.* at 631 (Powell, J., dissenting) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

¹⁶⁷ See *Gingles*, 478 U.S. at 35.

¹⁶⁸ 507 U.S. 146 (1993).

¹⁶⁹ *Id.* at 149-50.

¹⁷⁰ *Id.* at 147-48. The Court, per Justice O’Connor, made clear that it was not reaching a conclusion “whether influence-dilution claims such as appellees are viable under Section 2” of the Voting Rights Act. *Id.* at 154.

legislative apportionment inconsistent with the Fifteenth Amendment."¹⁷¹

In *Shaw I*, decided the same year as *Voinovich*, the Court again minimized the significance of the Fifteenth Amendment in vote dilution cases, even though the Voting Rights Act had specifically been enacted by Congress pursuant to its Fifteenth Amendment enforcement powers, an exercise of power that had been upheld. Justice O'Connor in *Shaw I* went so far as to suggest that the 1960 *Gomillion* decision was actually based upon the Fourteenth rather than the Fifteenth Amendment (as the majority in *Gomillion* had decided), thus nudging the Fifteenth Amendment even further into a corner in vote dilution cases.¹⁷²

This unresolved tension has continued to cause problems in the years since *Shaw I* and *Voinovich* were decided. It is true that the Court has never directly relied upon the Fifteenth Amendment to uphold or strike down a state apportionment plan. The closest it came to doing so was in *Gomillion*, which involved the actual withdrawing of municipal boundaries to distort minority voting rights; *Gomillion* remains an anomaly. Yet the Court cannot ignore twenty years of case-law applying the Voting Rights Act to vote dilution cases, since Congress amended Section 2 of the Act in 1982. It is true that "pure" Fifteenth Amendment cases are virtually non-existent in the realm of reapportionment. However, the Court must not overlook the fact that Congress injected the Fifteenth Amendment into the field, in effect, by enacting the Voting Rights Act in 1965 and broadening Section 2 of the Act in 1982, all pursuant to its enforcement powers under the Fifteenth Amendment.

The Fifteenth Amendment may not create an independent cause of action in vote dilution cases, absent proof of intent. However, that does not make that provision irrelevant; Congress has made it quite relevant.¹⁷³

By glossing over the admittedly imprecise role that the Fifteenth Amendment (as implemented by the Voting Rights Act) must still play in voting rights cases, and by blurring together the Fourteenth and Fifteenth Amendments and the Act, the Supreme Court has established a Hobson's choice for legislatures and reapportionment bodies. As Justice Souter properly complained in his *Bush* dissent, "The States, in short, have been told to get things just right, no dilu-

¹⁷¹ *Id.* at 159 (citing *Beer v. United States*, 425 U.S. 130, 142-43 n.14 (1976)).

¹⁷² *Shaw I*, 509 U.S. at 645. Justice O'Connor relies upon Justice Whittaker's concurrence in *Gomillion* to that effect. See 364 U.S. at 349 (Whittaker, J., concurring). The same point is made by Justice Stevens, concurring in *Mobile*, 446 U.S. at 86.

¹⁷³ See discussion of the significance of the Fifteenth Amendment in vote dilution cases *infra* notes 264-81 and accompanying text.

tion and no prominent consideration of race short of dilution, without being told how to do it.”¹⁷⁴ In effect, those entities must create districts that do not have the “result” of discriminating against racial minorities, in order to steer away from violations of the Voting Rights Act, which Congress enacted to enforce the Fifteenth Amendment. They may not take race into account in doing so, however, or they will contravene the Fourteenth Amendment. As Professor Karlan of Stanford Law School has aptly noted, reapportionment bodies “now find themselves walking a tightrope: if they draw majority-black districts they face lawsuits under the Equal Protection Clause; if they do not, they face both objections under Section 5 of the Voting Rights Act and lawsuits under Section 2.”¹⁷⁵

A majority of the Court—including Justice O’Connor—has increasingly come to recognize that race, *at times*, is a legitimate factor in redistricting. Nevertheless, the Court has clung to the Fourteenth Amendment as its dominant base, allowing strange inconsistencies to creep into the “predominant factor” test.

Courts and reapportionment bodies, in the trenches, will continue to struggle with their marching orders until the Supreme Court makes explicit that there is no such thing as a “pure” Fourteenth Amendment or a “pure” Fifteenth Amendment claim in this unusual terrain. The two provisions are joined at the hip when it comes to voting rights jurisprudence. If the “predominant factor” test is to survive in the twenty-first century, the Court must directly address the dual personality of this creature, begotten by two closely-related, but distinct, constitutional provisions.

V. REFINING THE “PREDOMINANT FACTOR” TEST

In the seven years since its debut in *Miller*, the “predominant factor” test has become increasingly complex and oblique, and hope-

¹⁷⁴ *Bush*, 517 U.S. at 1063-64 (Souter, J., dissenting). For a discussion of the tension created due to over-emphasis of equal protection jurisprudence, as it intersects with the Voting Rights Act and the Fifteenth Amendment, see Donovan L. Wickline, *Walking a Tightrope: Redrawing Congressional District Lines After Shaw v. Reno and Its Progeny*, 25 FORDHAM URB. L.J. 641 (1998).

¹⁷⁵ Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 289 (1996). The overemphasis on equal protection jurisprudence in terrain properly occupied at least in part by the Fifteenth Amendment became so confusing that some commentators urged the Court to re-define the Equal Protection Clause in the voting rights context to include a “results” test. See, e.g., Grubert, *supra* note 77, at 1854 (concluding that “the Court should return to requiring a showing of discriminatory effect to establish an equal protection violation”). What such logic overlooked was that it was the Voting Rights Act and the Fifteenth Amendment that required a different judicial lens in such cases. The Fourteenth Amendment was not the issue.

lessly unworkable for those in the field of reapportionment.¹⁷⁶ This is because the signals from the Supreme Court have been mixed. The test has meant different things to different Justices, with an omelet of ingredients that do not necessarily mix well when whipped together.¹⁷⁷ The most conservative members of the Court, led by Justice Thomas, have taken the inflexible stand that racial considerations in redistricting for any reason are *verboden*. Thus, in *Bush v. Vera*, Justice Thomas, joined by Justice Scalia, clung to this narrow position by invoking Fourteenth Amendment "reverse discrimination" decisions such as *Adarand Constructors, Inc. v. Peña*,¹⁷⁸ which had declared that "all governmental racial classifications must be strictly scrutinized."¹⁷⁹ Justice Thomas in *Bush* flatly rejected Justice O'Connor's suggestion, in the majority opinion, that some racial consciousness in redistricting might be permitted and that strict scrutiny was not automatically triggered simply because majority-minority districts have been intentionally created. Justice Thomas responded, "Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting."¹⁸⁰ Justice Thomas went on to emphasize in *Bush*: "I am content to reaffirm our holding in *Adarand* that all racial classifications by government must be strictly scrutinized and, even in the sensitive area of state legislative redistricting, I would make no exceptions."¹⁸¹

On the other end of the spectrum, some of the more liberal Justices—most notably Justice Stevens—have seemed unwilling to em-

¹⁷⁶ For a criticism of that test, see Pildes, *supra* note 4, at 2505-06. See also Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J.L. & POL. 591, 663 (1998) (terming the *Shaw* line of cases "internally incoherent" and "illogical to the core").

¹⁷⁷ Justice Souter correctly noted in *Bush v. Vera* that:

The result of this failure to provide a practical standard for distinguishing between the lawful and unlawful use of race has not only been inevitable confusion in statehouse and courthouses, but a consequent shift in responsibility for setting district boundaries from the state legislatures, which are invested with front-line authority by Article I of the Constitution, to the courts, and truly to this Court, which is left to superintend the drawing of every legislative district in the land.

517 U.S. at 1045-46 (Souter, J. dissenting).

¹⁷⁸ 515 U.S. 200 (1995).

¹⁷⁹ *Bush*, 517 U.S. at 999-1000 (Thomas, J., concurring) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *Miller*, 515 U.S. at 904-05; *Shaw II*, 517 U.S. at 904-05; *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).

¹⁸⁰ *Bush*, 517 U.S. at 1000.

¹⁸¹ *Id.* at 1002-03. In *Holder v. Hall*, 512 U.S. 874 (1994), Justice Thomas, concurring in the judgment, joined by Justice Scalia, went so far as to contend that the entire portfolio of Voting Rights Act jurisprudence since *Shaw* was misguided and that *Gingles* and its progeny should be overruled. For Justice Thomas, any form of race-consciousness in redistricting leads to "segregating the races into political homelands" that is anathema. *Id.* at 905 (Thomas, J., concurring). He concluded: "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day." *Id.* at 944 (Thomas, J., concurring).

brace the “predominant factor” test, finding it too insensitive to minority voting rights.”¹⁸² As Justice Stevens made clear in *Miller*: “I do not see how a districting plan that favors a politically weak group can violate Equal Protection.”¹⁸³

Justice Breyer, who authored the majority opinion in the recent *Easley* case, displayed a keen understanding of the mechanics of redistricting. *Easley* is the first major decision in the past decade to uphold a major redistricting plan, even though race was clearly *a factor* in drawing the North Carolina maps. The Court concluded that political considerations, i.e., the desire to construct districts with the maximum number of Democratic voters, dominated the process; therefore, strict scrutiny was not even triggered. Yet Justice Breyer’s effort to clarify the “predominant factor” test, where “racial identification correlates highly with political affiliation”—which is true in most redistricting cases—is so sophisticated that most judges and legislators will make little sense of it. In *Easley*, Justice Breyer wrote: “[T]he party attacking the legislatively drawn boundaries must show at least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.”¹⁸⁴

Justice Breyer’s “clarification” will only cause state reapportionment bodies and lower courts to scratch their heads as they struggle to make sense of yet another opaque standard. Still, incremental progress is better than no progress at all. Justice O’Connor’s key opinions—as the Justice who has dominated the Court’s opinion-writing in this niche of jurisprudence—indicates that a majority of the Court has increasingly grasped the practical nuances of redistricting. Justice O’Connor, often the spokesperson for the Court in such cases, has walked a cautious line in rejecting extreme plans that permit race to overpower traditional redistricting principles, while defending those plans, such as in *Easley*, in which race was a conscious yet secondary consideration. Yet those who do reapportionment work still puzzle over several questions. What separates these two closely-related categories of racial redistricting cases? When can race be a legitimate factor, linked to traditional districting criteria (as in *Easley*) and when does reliance upon racial factors cross over the line into the suspect realm, triggering strict scrutiny?

A voting rights lawyer would, of course, reply that race *always* can be a factor, as long as it does not constitute the “predominant factor.”

¹⁸² *Id.* at 1038-39 (Stevens, J., dissenting).

¹⁸³ 515 U.S. at 932 (Stevens, J., dissenting).

¹⁸⁴ *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

That simply returns us to the starting point, however, because it does not define the range of circumstances in which a redistricting body may exercise its discretion to consider racial factors without getting itself in trouble.

The first step is to peel apart the respective roles that the Fourteenth and Fifteenth Amendments must play in racial gerrymandering cases. Where the Fourteenth and Fifteenth Amendments intersect, one must apply a brand of analysis quite different than that applied in traditional equal protection claims. In such cases, it is not sufficient for legislatures and reapportionment bodies to draw districts of equal population that simply comply with the "one-person-one-vote" command of the Fourteenth Amendment. Nor is it enough to declare "there was no 'intent' to discriminate." This might satisfy the ordinary standard that applies to "reverse discrimination" under the Equal Protection Clause, but it is only partially helpful in voting rights cases. The more specific commands of the Voting Rights Act, premised upon the Fifteenth Amendment, require that the state go one step further. The "result" or "impact" of the map on racial minorities must also be considered. The Fifteenth Amendment mandates that states may not "deny" or "abridge" (diminish) the right to vote on account of race. The Voting Rights Act seeks to enforce that command through a rather complex and cumbersome "totality of the circumstances" analysis. This means that states must affirmatively pause in drawing districts and ask themselves: Are we slicing up the districts in a way that steers wide of any potential violation of the Act? Are the *results* going to be safely consistent with the Act, regardless of our intent?

One of the practical challenges for redistricting bodies is that a Voting Rights Act violation is hard to identify in advance, until a court challenge conclusively establishes its existence. States have access to population figures, voting age population figures, and detailed racial data, but how do they determine whether a districting map may drift into non-compliance with the Act? They can hire voting rights experts to crunch data, perform regression analyses, and opine whether the *Gingles* test is potentially violated. The "totality of the circumstances" test, however, leaves ample room for uncertainty and subjectivity. Only a trial court can make such a factual finding with any authority. The Supreme Court has indicated that determining the "maximum" number of majority-minority seats is not the proper benchmark for determining if the Act is satisfied.¹⁸⁵ But what is permissible? How do redistricting bodies test their work product in advance?

¹⁸⁵ See *supra* notes 183-84 and accompanying text.

This is where a certain zone of discretion for the reapportionment body is essential. Although strict "proportionality" is not the test under the Voting Rights Act,¹⁸⁶ states must be able to at least examine the rough proportion of minority citizens, compare it to the number of proposed minority districts, and use this as a guidepost in exercising their discretion responsibly.¹⁸⁷ Obvious departures from the mathematically-expected proportion of minority districts that emerge on a given map—although these do not constitute conclusive proof of a Voting Rights Act violation—should alert the redistricting body and cause its antennae to go up. Taking race into account in order to avoid such potential violations is a natural, permissible use of the state's discretion. Thus, unlike in the domain of traditional Fourteenth Amendment jurisprudence, conscious consideration of potentially discriminatory "results" when it comes to creating voting districts is inevitable given the existence of the Fifteenth Amendment and the Voting Rights Act. State reapportionment bodies cannot, and should not, try to escape it.

The Fourteenth Amendment still plays a major role in race-related redistricting cases. As the Supreme Court in *Katzenbach* acknowledged, Congress's legitimate exercise of its Fifteenth Amendment authority must still "consist with the letter and spirit of the constitution."¹⁸⁸ Yet it is incorrect and misleading to suggest that decisions like *Adarand* provide the final word for resolving voting rights litigation. If the Court were to embrace the approach advocated by Justices Thomas and Scalia in cases like *Bush*, this would virtually emasculate the Fifteenth Amendment and return to the days when *Mobile v. Bolden*¹⁸⁹ interpreted the Fourteenth and Fifteenth Amendments in *pari materia*, making discriminatory intent the benchmark. Such an interpretation was explicitly rejected when Congress amended the Voting Rights Act in 1982 and when the Supreme Court validated those amendments in *Gingles*. The Court must take stock of its recent case-law and nudge the jurisprudence on track before there is an unwitting derailment.

¹⁸⁶ See *Johnson v. De Grandy*, 512 U.S. 997, 1017-22 (1994).

¹⁸⁷ In other words, states should be permitted to consider whether minority citizens are represented in roughly the same proportion as they exist in the overall population. This is similar to the approach approved by the Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in the context of racially gerrymandered school districts. In *Swann*, Chief Justice Burger concluded that the relevant proportion of minority versus non-minority students in a district could be used as a "useful starting point" in fashioning appropriate remedial measures. At the same time, however, the Court made clear that such proportions could not be used as rigid quotas. *Id.* at 23-25.

¹⁸⁸ *Id.* (quoting *McCulloch v. Maryland*, 4 (Wheat.) U.S. 316, 421 (1819)).

¹⁸⁹ 446 U.S. 55 (1980).

It was wise, in the past decade, for the Court to conclude that the Voting Rights Act and hence the Fifteenth Amendment did not require states to intentionally maximize the number of majority-minority districts (or even require strict proportionality).¹⁹⁰ As Justice Souter wrote for the majority in *Johnson v. De Grandy*: "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast Failure to maximize cannot be the measure of § 2."¹⁹¹ Yet the opposite assumption, i.e., that all racial considerations are presumptively improper, threatens to infect the jurisprudence with an equally dangerous virus. As Professor Karlan has warned: "Ostensibly in the name of equal protection, the current judicial approach threatens to deny the Fourteenth Amendment's intended beneficiaries their ability to engage in the same sort of pluralist electoral politics that every other bloc of voters enjoys."¹⁹²

In the early cases, Justice O'Connor hedged her bets with respect to the extent to which race could be permissibly considered by a reapportionment body. Thus, in *Shaw I*, Justice O'Connor wrote: "Moreover, redistricting differs from other kinds of state decision-making in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."¹⁹³

In later cases, however, Justice O'Connor began clarifying her position on this important issue. In 1995, O'Connor went to the trouble of authoring a separate concurrence in *Miller* specifically to emphasize that application of the "predominant factor" test did not necessarily invalidate every district in which protecting racial minorities had been a consideration. That newly enunciated test, she wrote, "does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been a factor considered in the redistricting process."¹⁹⁴ The following year in *Bush*, Justice O'Connor went a step further, staking out a position in direct conflict with that of Justice Thomas. Here, she made explicit that: "Strict scrutiny does not apply merely because redistricting is performed

¹⁹⁰ See *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994); *Shaw II*, 517 U.S. at 913. Indeed, the *Johnson* Court suggested that "rough proportionality" between the minority group's population and the number of minority districts would generally defeat a claim under Section 2. *Johnson*, 512 U.S. at 1016-17.

¹⁹¹ *Johnson*, 512 U.S. at 1017.

¹⁹² Pamela S. Karlan, *Our Separatism? Voting Rights As an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 103 (1995).

¹⁹³ *Shaw I*, 509 U.S. 630, 646 (1993).

¹⁹⁴ *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring).

with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.¹⁹⁵

Thus, a majority of the Justices have gradually recognized that the conscious consideration of race is not always impermissible or undesirable in this unique redistricting context. In various opinions, the Court has recognized that it confronts a "most delicate task" where race and reapportionment are intermingled.¹⁹⁶ The Voting Rights Act, inevitably, brings the Fifteenth Amendment "into tension with the Fourteenth Amendment."¹⁹⁷ The dance that the Court must perform here is unlike any other in equal protection jurisprudence; it takes place on a dance-floor that straddles two different constitutional provisions, with the Fifteenth Amendment providing equally crucial treads for the Court's feet.

The most critical issue, in this quixotic territory where two Amendments abut each other, is often given short shrift, or ignored completely. The central question that courts and litigants should focus on is: Has the state adhered to traditional redistricting principles in drawing the map? The Court has occasionally noted the relevance of this question, but it generally gets buried in dicta. It is only when reapportionment officials and lower court judges zero in on the significance of traditional districting principles and recognize how those principles set parameters for dealing with issues relating to race, that the Fourteenth and Fifteenth Amendments will begin to work in smooth syncopation. A body of case-law exists on this subject; it simply has not been emphasized sufficiently in voting rights cases.

The fundamental districting principles that the Court has deemed legitimate over the years include, but are not limited to, "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests"¹⁹⁸ The final principle mentioned is particularly important in the voting rights context. Historically, reapportionment bodies have considered "communities of interest" as one legitimate factor in drawing fair and politically sensitive

¹⁹⁵ *Bush*, 517 U.S. at 958 (internal citation omitted). For Justice Thomas's contrary opinion, see *id.* at 999-1002 (Thomas, J., concurring).

¹⁹⁶ See, e.g., *Miller*, 515 U.S. at 905 ("In *Shaw v. Reno* . . . we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task.").

¹⁹⁷ *Miller*, 515 U.S. at 927.

¹⁹⁸ *Id.* at 916. See also *Shaw I*, 509 U.S. at 646 (citing *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) for the proposition that district lines drawn for contiguity and maintenance of political subdivisions are legitimate state purposes). For a useful detailed discussion of traditional districting principles and criteria, see David M. Guinn et al., *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 262-66 (1999).

districts.¹⁹⁹ A redistricting body need not draw rigid squares of equal population; in fact, few states do so.²⁰⁰ Rather, redistricting bodies traditionally take into account a host of intangible communities, seeking to give them, where practicable, a voice in the government without unduly fracturing that voice. Thus, school districts, religious communities, ethnic communities, geographic communities which share common bonds due to locations of rivers, mountains and highways, and a host of other "communities of interest" are routinely considered by districting bodies in order to construct fair and effective maps.²⁰¹ Shared racial background, along with political affiliation, ethnic identity, religious affiliation, occupational background, all can converge to create bona fide communities of interest, to the extent that the redistricting body makes an honest effort to draw lines around geographically compact groups in order to give them a voice in the governmental process.²⁰²

As a practical matter, it is rare that a reapportionment body is able (or desires) to wholly capture a "community of interest" and draw lines around it, in a fashion that perfectly isolates it into a circle or square. In reality, communities of interest are elusive, imprecise entities. Reapportionment bodies and lower courts must be cautious when it comes to this concept, particularly where it serves as a basis for creating legislative districts tied to race, because it has the potential for abuse. Specifically, it can be used as a ruse to engage in improper maximization of majority-minority districts where no real communities exist.²⁰³ At the same time, states have historically considered a broad range of such imprecise communities of interest (many of which are naturally intertwined) in exercising their sound discretion. They do so to satisfy constituents. They do so to sweep together a host of generally identifiable interest groups that wish to be given a unified voice. This is perfectly healthy and permissible. It

¹⁹⁹ See *Miller*, 515 U.S. at 916 (referring to "communities defined by actual shared interests" as a traditional race-neutral consideration); *Shaw I*, 509 U.S. at 646.

²⁰⁰ Iowa empowers a wholly neutral Commission to create new districts of equal size, somewhat randomly, using a computer program. GORMLEY, REAPPORTIONMENT, *supra* note 5, at 74. But this is unusual and has its drawbacks, particularly in states that are more varied in their geographic terrain. *Id.* at 74-75. For a discussion of the various methods that states employ to accomplish reapportionment, see Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

²⁰¹ GORMLEY, REAPPORTIONMENT, *supra* note 5, at 74.

²⁰² For an excellent discussion of the notion of racial "communities of interest," see Kelly, *supra* note 8. See also *Miller*, 515 U.S. at 920 (indicating that states may recognize communities with a particular racial makeup, as part of redistricting, "provided its action is directed towards some common thread of relevant interests"); J. Gerald Herbert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 452 (2000).

²⁰³ See, e.g., *Miller*, 515 U.S. at 919-20 (concluding that it was insufficient for the State of Georgia to invoke "communities of interest" in constructing an unsightly, non-compact district that had no common thread but skin color).

is an important aspect of the state's prerogative, when it comes to structuring its own form of government. Consequently, when it comes to reapportionment bodies considering race in this permissive, discretionary fashion, the courts should scrupulously avoid meddling.

In sum, states naturally digest input from a panoply of interest groups, all of which seek to influence the political process for their own betterment. Making race simply *a* factor, among many, that enters the mix of redistricting is not only permissible, but inevitable and desirable. As Justice O'Connor noted in *Shaw I*: "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."²⁰⁴ It is only when racial considerations eclipse traditional apportionment principles that race becomes the "predominant motivating factor" which triggers strict scrutiny. As Justice Kennedy explained in *Miller*:

To make this showing, [that race was the predominant factor motivating the legislature's decision to place a significant number of voters inside or outside a particular district] a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.²⁰⁵

The Court must therefore clarify that it is legitimate to knowingly and intentionally draw individuals who are members of racial minority groups into districts together if done consistently with traditional districting principles. It happens routinely. In part, it occurs in order to produce a compact district, or in order to ensure contiguity. Most commonly, as was the case in our Philadelphia exercise, members of racial minorities are encompassed in common districts because they share legitimate "communities of interest."²⁰⁶ These communities are not based strictly on skin color. Rather, the overlap with common neighborhoods, churches, political affiliation, and other shared interests that form common threads. Politics is the art of responding to cohesive interest groups, including those formed by minority citizens. The Fifteenth Amendment and Voting Rights Act never envisioned that racial minorities would be given less input and less influence than dozens of other groups that lobby for districts in order to ensure themselves healthy representation. Italian-Americans, Irish-Americans, Jews, Catholics, Arab-Americans, Latinos, Germans, and countless other groups organize to influence the political reapportionment process. Where apportionment bodies seek

²⁰⁴ *Shaw I*, 509 U.S. at 646.

²⁰⁵ *Miller*, 515 U.S. at 916.

²⁰⁶ See, e.g., Kelly, *supra* note 8; Herbert, *supra* note 202, at 452.

to respect legitimate communities of interest in drawing district lines, without producing tortured and strained maps, they are adhering to customs and methods as old as the American process of reapportionment itself.

Indeed, "the fact that groups that have influence within the reapportionment process usually choose to draw districts in which they predominate, rather than spreading themselves across a greater number of districts,"²⁰⁷ should caution against the unfair assumption that racial minority groups—unlike a host of other groups in society—"are doing something wrong" when they seek to influence the political redistricting process using their collective force. Redistricting bodies can and should draw lines around minority voters who live together, and form distinct communities of interest, just as they draw lines around countless other groups that share common interests and legitimately seek representation together in the legislature.²⁰⁸ As long as the redistricting body does not apply a different set of rules to racial groups than it does to any other interest group during the reapportionment process, or depart from those ordinary districting principles that have guided the construction of the overall redistricting map, this type of conscious consideration of race is perfectly legitimate and commonplace.²⁰⁹

If we lived in a Platonic world in which politics could be divorced from the notion of "community,"²¹⁰ it might be possible to construct spheres of governance without reference to interest groups and other imprecise "communities of interest." Politics, however, is a continual driving force in the American system of government. It would hardly seem fair, even without the Fifteenth Amendment or Voting Rights Act, to treat racial interest groups and their "communities" more harshly than other groups that routinely and aggressively influence the process.²¹¹ Given the adoption of the Fifteenth Amendment and Voting Rights Act, it would be inexcusable to do so.²¹²

²⁰⁷ Karlan, *Loss and Redemption*, *supra* note 44, at 300-01.

²⁰⁸ See Ken Gormley, *Where To Draw the Line*, N.Y. TIMES, July 7, 1995, at A13.

²⁰⁹ See Guinn et al., *supra* note 198, at 261-66.

²¹⁰ For Plato and Aristotle, "[b]eing a part of the political community required limiting individual autonomy in favor of solidarity to the political whole." CHRISTOPHER M. BURKE, *THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT* 130 (1999).

²¹¹ A similar point is made by Professor Larry Alexander, who suggests that if the Constitution is going to invalidate district lines based upon race, "it should invalidate all outcome-driven plans, no matter what proxies are used, whether they be race, political affiliation, or something else." Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327, 337 (1997). Or, to put it in different terms, the "conscientious

Moreover, the Court should recognize, explicitly, that compliance with the Voting Rights Act is an ongoing, incremental process, which establishes "a baseline of fair play."²¹³ It is unrealistic to conclude that a state can only consider race in reapportionment *after* it has allowed districts to deteriorate to a point that they conclusively violate the Act. As discussed earlier, the state must have discretion to consider race at some level, in order to ensure that the resulting districts do not drift into noncompliance with the Act.²¹⁴ It is the role of state legislatures, not the courts, to exercise that judgment necessary to size up the proposed districts and steer clear of potential violations, costly litigation, and politically explosive mistakes. It is here that the distinction between what is "mandatory" and what is "permissive" is critical. Although the Voting Rights Act may not *mandate* a certain level of conscious racial consideration,²¹⁵ the Supreme Court must make clear that such discretion is permissible. To the extent that the Court widens the zone of discretion for states in fleshing out the "predominant factor" test, the better off courts, litigants, and reapportionment bodies will be.

It may be true that compliance with the Voting Rights Act does not constitute a "compelling state interest" for purposes of satisfying the "predominant factor" test unless there is a "strong basis in evidence" for concluding that the three *Gingles* pre-conditions and the "totality of the circumstances" test can be established to prove a violation of the Act.²¹⁶ Yet strict scrutiny is not even triggered where race is simply *a factor*, rather than a predominant motivating factor. As long as traditional redistricting principles are not cast to the wind in order to group together minority voters who have little in common—as was

redistricting" must necessarily accommodate minority groups just like any other groups. See Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F. L. REV. 1, 6 (1995).

²¹² One argument frequently made against consciously taking race into account in redistricting, in any fashion, is that minority groups actually *benefit* from being dispersed widely rather than being crammed into districts with other minorities. The assumption is that minority voters are "better off having *some* influence over a broad range of legislators rather than *intense* influence over a few." Karlan, *Loss and Redemption*, *supra* note 44, at 300. The response to this contention, as Professor Karlan has neatly stated, is that no other interest group seeks to intentionally disperse itself. Rather, where communities of interest exist—whether based upon racial, ethnic, religious, socio-economic, political, or other bases—the norm is for those groups to seek cohesion in the political process: "[T]he fact that groups that have influence within the reapportionment process usually choose to draw districts in which they predominate, rather than spreading themselves across a greater number of districts, cautions against blind acceptance of the critics' assumption." *Id.* at 300-01.

²¹³ BURKE, *supra* note 210, at 143.

²¹⁴ See discussion *supra* notes 183-87 and accompanying text.

²¹⁵ For instance, the Act may not require that the state consider the proportion of minority citizens in a particular geographic area before drawing districts.

²¹⁶ *Shaw I*, 509 U.S. at 656 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion) (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1986) (plurality opinion))).

true in cases like *Shaw I*, *Miller*, *Shaw II*, and *Bush*—states may remain cognizant of the fuzzy parameters of the Voting Rights Act and the Fifteenth Amendment, going about their business in a way that will avoid present or future violations.

A zone of legislative discretion here is essential. Otherwise, as Justice Breyer has aptly observed, there would be no way for state legislatures to adhere to the commands of the Act until it was too late: “A legal rule that permits legislatures to take account of race only when § 2 [of the Act] *really* requires them to do so is a rule that shifts the power to redistrict from legislatures to federal courts (for only the latter can say what § 2 *really* requires).”²¹⁷

VI. A NEW PREDOMINANT FACTOR TEST

Thus far, the Supreme Court has told state redistricting bodies what they *cannot* do, i.e., they cannot use race as a “predominant motivating factor” in drawing districts. That is a useful starting point. Now the Court must spell out, with crystal clarity, the boundary lines of that negative command: What precisely does it mean to rely upon race as a “predominant factor” in drawing electoral districts? Second, the Court must go a step further, stating in plain terms the positive obverse side of that command: When, and to what extent, is it *permissible* to consider race in the redistricting process without running afoul of the Constitution?

A. Defining Race As a “Predominant Factor”

What does it mean to prohibit racial considerations from being a “predominant motivating factor” in reapportionment? If it is to be something more than tautology, that goes beyond saying “race cannot be considered illegitimately,” it must be capable of being broken down into components that can be applied in concrete cases to guide courts, litigants, and reapportionment mapmakers. Since *Shaw v. Hunt* was decided in 1996, the Court has continued to add layers to that test, giving it increased depth and weight. The critical components of the “predominant factor” test can therefore be reformulated as follows:

First, a court’s ultimate goal in a voting rights case, in which racial considerations are implicated, must be to decide whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”²¹⁸

²¹⁷ *Abrams v. Johnson*, 521 U.S. 74, 114 (1997) (Breyer, J., dissenting).

²¹⁸ *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Second, as a procedural matter, plaintiffs have the burden of demonstrating this “through direct or circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose”²¹⁹ The Court has stated that “the burden of proof on the plaintiffs [who attack the district] is a ‘demanding one.’”²²⁰

Third, in exploring whether race was indeed a predominant motivating factor in the redistricting operation, a court must inquire whether the legislature “subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”²²¹ Often, the answer to this question will be obvious: If the legislature has jettisoned traditional redistricting principles in order to accomplish a racial gerrymander, the constitutional infirmity is frequently obvious because the district is “unexplainable on grounds other than race.”²²²

Fourth, where a plaintiff does not meet the demanding burden of proving that race was a predominant motivating factor in redistricting, strict scrutiny is not triggered. This is true even though race might have been considered. In such a case the rational basis test of the Fourteenth Amendment, which is extremely deferential to the state reapportionment body, applies.²²³

Fifth, if it is shown that race was indeed the predominant motivating factor driving the creation of the district, strict scrutiny is brought into play.²²⁴ As Justice O’Connor has stated: “To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.”²²⁵ If that threshold is met, the racially-driven district will be deemed violative of the Fourteenth Amendment Equal Protection Clause unless there exists a “compelling government interest” justifying the crea-

²¹⁹ *Id.*

²²⁰ *Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Miller*, 515 U.S. at 928 (O’Connor, J., concurring).

²²¹ *Miller*, 515 U.S. at 916.

²²² *Shaw I*, 509 U.S. at 644 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Easley*, 532 U.S. at 242.

²²³ See, e.g., *Miller*, 515 U.S. at 915-16; *Easley*, 532 U.S. at 242 (indicating that generally states have wide discretion in redistricting judgments). See also *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (setting forth traditional rational basis standard).

²²⁴ See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (“Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.”).

²²⁵ *Miller*, 515 U.S. at 928 (O’Connor, J., concurring).

tion of the district and its creation is "narrowly tailored" to accomplishing that compelling interest.²²⁶

Sixth, and finally, one way to establish a "compelling state interest" sufficient to satisfy the strict scrutiny test is to demonstrate that creation of the race-based district was "narrowly tailored" to comply with the Voting Rights Act.²²⁷ This is not because the Voting Rights Act trumps the Fourteenth Amendment (it does not), but because the Fifteenth Amendment, which underlies the Act, creates a special branch of jurisprudence where the two constitutional amendments intersect.²²⁸ It is not enough for a state to prove that it had a good faith belief that a Voting Rights Act violation might occur. Rather, the Court has insisted that in order to establish a compelling state interest in adhering to the Voting Rights Act, the state must have a "strong basis in evidence for [concluding] that remedial action [is] necessary."²²⁹ A "mere assertion" by the state that "remedial action is required" is insufficient.²³⁰ However, if there exists a strong basis in the evidence that a violation of the Act can be established, constituting a compelling governmental interest, remedial steps, which typically include drawing additional majority-minority districts, are legitimate.²³¹

²²⁶ *Id.* at 904 (citing *Adarand*, 515 U.S. at 227, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274, 280 n.6 (1986) (plurality opinion).

²²⁷ See *Bush*, 517 U.S. at 990 (O'Connor, J., concurring) ("compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest"). See also *Shaw II*, 517 U.S. at 915, where Chief Justice Rehnquist wrote: "We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 [of the Act] could be a compelling interest . . ." See also *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 161-62 (1997) (plurality opinion of White, J.) (indicating that race may constitutionally be taken into account in order to comply with the Act). For a useful discussion of how a plaintiff can demonstrate a "compelling government interest" based upon compliance with the Voting Rights Act, see W. Mark Crain, *The Constitutionality of Race-Conscious Redistricting: An Empirical Analysis*, 30 J. LEGAL STUD. 193 (2001).

²²⁸ See discussion *supra* notes 196-97 and accompanying text.

²²⁹ *Shaw I*, 509 U.S. at 656 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion), (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1986) (plurality opinion))).

²³⁰ *Miller*, 515 U.S. at 922. Nor is it sufficient that the state accept on its face the "[Justice] Department's determination that race-based districting is necessary to comply with the Act," in a state required to obtain preclearance under Section 5. *Id.* Rather, "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.*

²³¹ This does not give a state license, however, to create any extravagant district it wishes to create in order to comply with the Act. As a general rule, it will simply permit the state to draw a district that is compact and adheres to traditional districting principles. If a violation of *Gingles* is established, it will (by definition) involve a relatively compact and coherent group of minority citizens. Thus, the remedy need not, and should not, extend further than the actual statutory and/or constitutional violation.

Once the Supreme Court reorganizes the elements of the “predominant factor” test, as set forth above (which amounts to an elucidation of previous Court pronouncements), it will have nudged the jurisprudence forward to a new level of concreteness. Yet, even thus clarified, that test remains a wholly negative command—it tells redistricting bodies what they *cannot* do without running afoul of the Constitution. If state apportionment bodies are to be able to take action, without being paralyzed by the fear of stepping outside of permissible constitutional boundaries, the Court must take an additional step and illuminate the positive obverse of that command.

B. When Can Race Legitimately Be Considered?

It is clear from the Supreme Court cases of the past decade, particularly the most recent *Easley* decision, that race can legitimately be *a factor* in redistricting, without violating the Constitution, in certain instances. Yet, further guidance is needed. In what circumstances is it permissible to rely upon racial considerations in constructing legislative districts, consistent with the potentially conflicting mandates of the Fourteenth and Fifteenth Amendments? One way to seek to resolve that question is from a negative angle, i.e., by determining when racial considerations are forbidden. If reapportionment bodies and lower courts scrupulously apply the re-tooled, six-step “predominant factor” test set forth above, they will generally reach the constitutionally indicated result. However, to the extent that application of that test is tinged with an ill-defined assumption that the conscious consideration of race is forbidden, the test will yield skewed results.

It is thus preferable for those engaged in practical redistricting work to have available an additional, positive set of guideposts. The purpose of these guideposts is not to displace the existing “predominant factor” approach as a hard and fast test. Rather, they are designed to be considered by courts, lawyers, and redistricting officials as an aid in defining the permissible, non-mandatory, zone of discretion in this area. When assessed in conjunction with the six-part “predominant factor” test, set forth above, these guideposts can help yield results consistent with the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The relevant guideposts are as follows:

First, it is essential to acknowledge the basic premise that racial considerations in reapportionment are not necessarily illegitimate or unconstitutional. As Justice O’Connor clearly stated in *Shaw I*:

[R]edistricting differs from other kinds of state decision making in that the legislature always is *aware* of race when it draws district lines, just as it

is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.²³²

Second, it is permissible, in the exercise of its discretion, for a state reapportionment body to consciously consider racial factors, along with a host of other factors.²³³ "[E]ven though race may well have been considered in the redistricting process," this is not enough to sustain a challenge.²³⁴ As long as boundaries are drawn "in accordance with [its] customary districting principles," a state reapportionment body may properly consider race in achieving a fair redistricting plan.²³⁵

Third, the most common way in which a redistricting body can consider race as a legitimate factor is in seeking to preserve bona fide "communities defined by actual shared interest," a traditional goal of reapportionment.²³⁶ Racial communities, not unlike numerous other communities that seek a voice in the political process, are entitled to lobby the reapportionment body to draw lines in a fashion that allows them to maintain political cohesion and enjoy a fair opportunity to elect candidates of choice. Consequently, a state may take into account communities with a particular racial makeup, as part of redistricting, "provided its action is directed towards some common thread of relevant interests."²³⁷ Skin color alone is not a community of interest. But race, to the extent that it naturally intertwines itself with neighborhoods, municipalities, churches, civic organizations, school districts, and other relatively cohesive and compact communities, is a perfectly legitimate factor for legislative reapportionment bodies to consider as part of their broad discretion in structuring their own systems of government. This common thread must be "tangible;" "mere recitation of purported communities of interest" is insufficient.²³⁸ If the common thread is limited to race, this is cause for skepticism. More typically, it is intertwined with a host of other identifiable communities that go into the vast political crucible. Strict scrutiny is not triggered if race is legitimately considered in this

²³² *Shaw I*, 509 U.S. at 646.

²³³ To put it another way, those seeking to invalidate a plan must do more than just show that race was "a motivation for the drawing of a majority minority district." *Bush*, 517 U.S. at 959; *Easley v. Cromartie*, 532 U.S. 234, 241 (2001).

²³⁴ *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring); see also *Shaw I*, 509 U.S. at 646.

²³⁵ *Miller*, 515 U.S. at 928 (O'Connor, J. concurring).

²³⁶ *Id.* at 916. See also *Shaw I*, 509 U.S. at 646; *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964).

²³⁷ *Miller*, 515 U.S. at 920; Herbert, *supra* note 202, at 452.

²³⁸ *Miller*, 515 U.S. at 919; Herbert, *supra* note 202, at 452. Thus, in *Bush*, the Court rejected the communities of interest argument because evidence of commonality had not been "available to the [Texas] Legislature in any organized fashion before [the districting plan] was created." 517 U.S. at 966.

fashion.²³⁹ Districting lines are routinely drawn around natural pockets of racial, ethnic, religious, and other groups as part of the give-and-take of politics.²⁴⁰ As one author wrote: "Multitudes of social communities characterize a healthy political community."²⁴¹ This is perfectly acceptable, so long as traditional districting principles are respected in the process.

Fourth, in light of the unique commands of the Fifteenth Amendment and the Voting Rights Act, there is an additional reason that states may consider race; namely, to ensure that the reapportionment map does not drift into noncompliance with the Act. In other words, a redistricting body legitimately can keep one eye on the "results" test. It may use "proportionality" as a guidepost, but not as a rigid proxy for quotas.²⁴² This is a delicate maneuver, but not an impossible one. The redistricting body is permitted to use its discretion to remain cognizant of race in a secondary fashion, to ensure that the "resulting" districts, based upon a "totality of the circumstances," do not unfairly disfavor racial minorities. This is justified by the specific constitutional and statutory mandate that states shall not "deny" or "abridge" the right to vote on account of race, even unintentionally. The Fifteenth Amendment and Voting Rights Act are premised upon the harsh fact that "some racial minorities have lost more than their share for far too long."²⁴³ The law therefore provides a mechanism by which government entities can (and should) remain on the alert, offering "a modicum of fairness or impartiality without which the marginalized or oppressed may suffer further."²⁴⁴ Such an indirect consideration of race in order to "check" proposed maps and allow the reapportionment body to satisfy itself that it has steered away from obvious danger with respect to potential violations of the Act does not by itself trigger strict scrutiny. Only if the redistricting body crosses the line and begins to affirmatively construct districts utilizing race as a "predominant motivating factor," is the heightened standard of strict scrutiny triggered.

Fifth, reapportionment bodies are entitled to a considerable amount of deference in this area. As the Court reiterated in *Easley*, "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence."²⁴⁵ The legislature "must have the discretion to exercise the political judgment necessary to balance

²³⁹ *Bush*, 517 U.S. at 958.

²⁴⁰ For an eloquent, albeit theoretical, discussion of the importance of racial communities of interest, see Kelly, *supra* note 8.

²⁴¹ BURKE, *supra* note 210, at 145.

²⁴² See discussion *supra* notes 185-87 and accompanying text.

²⁴³ BURKE, *supra* note 210, at 147.

²⁴⁴ *Id.* at 143.

²⁴⁵ *Miller*, 515 U.S. at 915; *Easley*, 532 U.S. at 242.

competing interest.” Consequently, the courts must “exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.”²⁴⁶

Considering these positive guideposts should assist those engaged in reapportionment work, including lower courts, in producing sensible results from the six-step “predominant factor” test. The guideposts should help identify that zone of discretion in which reapportionment bodies can act safely, taking race into account consciously without crossing the line into impermissible decision-making.

If the re-tooled “predominant factor” test had been applied in conjunction with the relevant guideposts, set forth above, the same results most likely would have been obtained in major redistricting cases decided by the Supreme Court over the past decade.

The string of cases invalidating racial gerrymanders—including *Miller*, *Shaw II*, and *Bush*—would have remained unchanged. In each case, there was significant evidence that although political considerations and other factors were involved, the redistricting body had “subordinated traditional race-neutral districting principles” and used race as the “predominant motivating factor” in constructing those districts. Indeed, in most of the cases, the majority of the Court found ample evidence that race had driven the process and led to extravagant departures from the states’ traditional districting principles. Absent a “strong basis in the evidence” that concrete Voting Rights Act violations existed, the reapportionment plans in those cases would have been invalidated. Moreover, consideration of the positive guidelines would not have changed the analysis. The states, in the cases at issue, did more than seek to preserve legitimate communities of interest and guard against “results” that overtly treated racial minorities unfairly.²⁴⁷ They actively manipulated boundaries, in disre-

²⁴⁶ *Miller*, 515 U.S. at 916; *Easley*, 532 U.S. at 242.

²⁴⁷ If a reapportionment body were to flip its analysis to the positive side of the predominant factor test, in cases like *Shaw I*, *Miller*, *Shaw II*, and *Bush*, none would fall into the category in which race was simply a factor, legitimately, in the redistricting equation. One could not point to compact groups of minority voters—such as those in our Philadelphia experience—who formed legitimate communities of interest and simply wished to have lines drawn around their natural communities. Nor could one say that the redistricting body had considered race as a simple “check” to ensure that the “result” of the districting plan was not facially unfair to minorities and thus complied with the Fifteenth Amendment and the Voting Rights Act. To the contrary, in each of those cases, the states departed from bona fide communities of interest. See, e.g., *Miller*, 515 U.S. at 919 (“Nor can the State’s districting legislation be rescued by mere recitation of purported communities of interest. The evidence [in *Miller*] was compelling ‘that there are no tangible “communities of interest” spanning the hundreds of miles of the Eleventh District.’”). In *Miller*, there was nothing but “fractured political, social, and economic interests” swept within the district. *Miller*, 515 U.S. at 919. Nor were states simply avoiding the desire to avoid facial irregularities which might disadvantage minorities. Rather, they affirmatively stretched groups unnaturally in a way that perverted traditional districting principles, such that the district was not compact or consistent with legitimate population patterns.

gard of traditional districting principles, generally in an illegitimate effort to *maximize* minority representation. Even recognizing the zone of discretion that exists before racial factors can be said to “predominate,” the Court would have concluded that the states went beyond the scope of their appropriate power under the Constitution.

While reaching the same results, the re-tooled test and accompanying guidelines would allow the Court to much more easily handle cases like *Easley* without having to bob and weave and feign naiveté when it comes to evidence of overt racial considerations. In *Easley*, race clearly did play a role in the redistricting body’s calculations. The dissenting Justices—Thomas, Scalia, Kennedy, and Chief Justice Rehnquist—were correct in pointing to evidence accepted by the district court indicating that race was consciously considered by the North Carolina legislature in drawing the Twelfth District.²⁴⁸

Justice Breyer, writing for the majority in *Easley*, held that the district court’s findings were “clearly erroneous” to the extent that they concluded that “race, not politics” drove the construction of the district.²⁴⁹ That much was correct. In the process, however, Justice Breyer was forced to downplay the evidence of racial considerations to which the district court had given credence in order to steer wide of the unpredictable “predominant factor” test. Indeed, the North Carolina legislature, its lawyers, and its experts all seemed to engage in a game of “hear no evil, see no evil,” avoiding a candid acknowledgement of the role of race to avoid stepping into that jurisprudential Bermuda Triangle.²⁵⁰ Such a foreswearing of conscious racial awareness was not necessary, however, for the courts or the litigants to correctly resolve the case. The facts proven at trial may have estab-

²⁴⁸ Specifically, a legislative redistricting leader, Senator Roy Cooper, while testifying before a legislative committee in 1997, had stated that the plan satisfied a “need for ‘racial and partisan’ balance,” indicating express consciousness of the race factor. *Easley*, 532 U.S. at 253, 266 n.8 (Thomas, J., dissenting). There was also an e-mail from the drafter of the plans to senators in charge of redistricting, which stated: “I have moved Greensboro Black community into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this.” *Id.* at 254. As well, Plaintiff’s expert [Dr. Weber] took the position that “time and again . . . race trumped party affiliation in the construction of the 12th District . . .” *Id.* at 240. For a summary of the district court’s findings relating to race, as a factor in redistricting, see *id.* at 240-41. Justice Thomas applied traditional Fourteenth Amendment strict scrutiny to this evidence and concluded:

As I see it, this inquiry is sufficient to answer the constitutional question because racial gerrymandering offends the Constitution whether the motivation is malicious or benign. It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters.

Id. at 266-67 (Thomas, J., dissenting).

²⁴⁹ *Easley*, 532 U.S. at 243-44.

²⁵⁰ For a summary of the testimony of the state’s primary expert, Dr. David W. Peterson, which scrupulously avoided acknowledging that race played a role in the legislature’s redistricting decisions, see *Easley*, 532 U.S. at 239, 251-53.

lished that race was overtly considered in crafting the redistricting plan. However, this does not mean that the plan was unconstitutional; there was no need to hide from it. Contrary to the view expressed by Justice Thomas, in his dissent,²⁵¹ such a finding should not have even triggered strict scrutiny.

The district court's principal error lay not in its assessment that some racial juggling took place in the reapportionment process. Rather, it erred in applying an overly-rigid "predominant factor" test. It fell victim to the assumption that once overt racial considerations were detected, the redistricting plan was presumptively infirm.

Had the district court worked its way through a re-tooled "predominant factor" test, set forth above and taken into account the positive guideposts which allow consideration of race within certain parameters, it would have most likely rejected the attack on the redistricting plan. For, as the majority in *Easley* concluded, political considerations, i.e., the desire to construct a safe Democratic seat, predominated over racial considerations in creating that district. Race was certainly considered; to deny that would be disingenuous. Yet traditional districting criteria such as concerns for compactness, preserving political bases, and the desire to draw lines around legitimate communities of interest were also considered heavily. It was these considerations, not race, that predominated.²⁵²

Thus, there was no need for those involved to treat the race issue like the plague. In light of the fact that North Carolina districts had to be precleared under Section 5 of the Act, it would have amounted to malfeasance for the state legislature to ignore racial demographics in going about its reapportionment work. Particularly in a state like North Carolina where, as *Easley* demonstrates, race and party affiliation are closely aligned,²⁵³ remaining cognizant of racial factors is unavoidable in conducting redistricting work. The parties should have felt free to admit it; the district court should have welcomed the candor. Had the district court employed a less rigid version of the "predominant factor" test and considered the positive obverse of that test, it would have simply concluded that strict scrutiny was not triggered.

Once the Supreme Court provides appropriate direction to lower courts, much of the pressure will be removed from judges tormented by impossible, inconsistent commands in redistricting cases. Litigants and their lawyers will no longer have to stretch the truth. Fact-finders

²⁵¹ *Id.* at 266-67 (Thomas, J., dissenting). See also *Bush*, 517 U.S. at 999-1000, 1002-03 (Thomas, J., concurring).

²⁵² *Easley*, 532 U.S. at 257 (suggesting that politics and "traditional, non-racial districting principles" predominated).

²⁵³ *Id.* at 258.

and appellate courts will no longer have to pretend racial factors are non-existent in order to uphold fair and sensible maps as in *Easley*.

CONCLUSION

The Fifteenth Amendment gives Congress broad power to correct state action which, intentionally or unintentionally, "abridges" or "denies" the right to vote on account of race. President Lyndon B. Johnson called the Voting Rights Act "one of the most monumental laws in the entire history of American freedom."²⁵⁴ The Supreme Court upheld this extraordinary Act, in *South Carolina v. Katzenbach*, as an appropriate exercise of Congress's power to enforce the Fifteenth Amendment. Three years later, in *Allen v. State Board of Elections*, the Court declared that the Act should be given "the broadest possible scope."²⁵⁵ The Court in *Gingles* upheld the equally expansive 1982 amendments to the Act, designed to ensure that racially discriminatory results would not occur in the creation of voting districts. Indeed, the broad "totality of the circumstances" test under the amended Section 2(b) of the Act "springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power."²⁵⁶ This means that state redistricting bodies will, and should, remain cognizant of race in drawing fair legislative districts. Subtle discrimination in redistricting continues to infect the fundamental right to vote in the United States.²⁵⁷ Yet progress has been marked. It is indisputable that "remedies for vote dilution (and hedges against its reappearance) in the form of majority-minority districts" account for the fact that minority representation in Congress has been on the rise, after two centuries of dismal statistics.²⁵⁸

²⁵⁴ DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 132 (1978); Karlan, *Loss and Redemption*, *supra* note 44, at 292.

²⁵⁵ *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969).

²⁵⁶ *McCain v. Lybrand*, 465 U.S. 236, 243-46 (1984), *quoted in* *Johnson v. Florida*, 512 U.S. 997, 1018 (1994).

²⁵⁷ See Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 770-71 (1996) (observing that after redistricting in the early 1990's, "[B]lack, who constitute 11.1% of the nation's voting age population, made up only 4.9% of the members of Congress").

²⁵⁸ *Minorities in Congress*, 52 CONG. Q., Supplement to No. 44, at 10 (Nov. 12, 1994), *quoted in* *Bush*, 517 U.S. at 1051 (Souter, J., dissenting) (demonstrating that the 104th Congress, after redistricting, showed an increase of thirty-nine black members over the 1981 total). It is a noteworthy statistic that by 1990, "twenty-four blacks and ten Hispanics sat in Congress, 417 blacks and 124 Hispanics were in state [legislatures], and six of the ten largest U.S. cities had elected black mayors." HUDSON, *supra* note 12, at 231. After the redistricting efforts in the early 1990's, "the number of majority-black and majority-Hispanic congressional districts nearly doubled and the number of black and Hispanic representatives increased 50% and 38%, respectively, between 1990 and 1993." See Terry Smith, *Reinventing Black Politics: Senate Districts*,

It amounts to a weak deflation of constitutional principle to suggest that the Fifteenth Amendment plays no significant role in voting rights cases and that Fourteenth Amendment jurisprudence has a monopoly in this domain. If anything, the rules of constitutional interpretation indicate the reverse. The Fifteenth Amendment was ratified two years after the Fourteenth Amendment. As a general rule, where two provisions overlap, the latter provision in time carries with it a unique significance.²⁵⁹ For instance, as Professor Laurence Tribe explains in his treatise, the enfranchisement of women accomplished by the Nineteenth Amendment undoubtedly "altered the meaning of the Equal Protection Clause of the Fourteenth Amendment with respect to claims of gender discrimination."²⁶⁰ Thus, the later-in-time Nineteenth Amendment "shifted the ground" on which the previous Amendment was built.²⁶¹ Similarly, one can presume that the Framers did not adopt the Fifteenth Amendment as mere surplusage. That provision was designed to deal, like a surgeon's instrument, with a precise form of discrimination (i.e., that dealing with voting) that had long infected the American political system. The Fifteenth Amendment was, and remains, more narrow in its aim than the Fourteenth Amendment. Although the Court has been loathe to assign weights to competing constitutional provisions,²⁶² more specific provisions certainly carry at least as much heft as less specific commands.²⁶³

The Court has assiduously avoided defining the precise role of the Fifteenth Amendment (if any) in vote dilution cases.²⁶⁴ Indeed, the question has been left open whether the Fifteenth Amendment serves any function in voting cases, other than to guarantee that minorities have a right to cast a ballot and participate in elections.²⁶⁵ Some cases suggest that when it comes to the *dilution* of one group's right to vote

Minority Vote Dilution and the Preservation of the Second Reconstruction, 25 HASTINGS CONST. L.Q. 277, 281 (1998).

²⁵⁹ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-68 (3d ed. 2000).

²⁶⁰ *Id.* at 68.

²⁶¹ *Id.*

²⁶² See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (declining to assign relative "rankings" to First and Sixth Amendment rights).

²⁶³ *Id.* at 561, 570. See also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 769 (1976) (suggesting that advertising bans that might withstand challenge on due process and equal protection grounds had to yield to the "close inspection" required by the First Amendment). See also *United States v. United States Dist. Ct.*, 407 U.S. 297, 320 (1972) (suggesting that the President's power to engage in domestic security surveillance pursuant to Article II, § 1 of the Constitution had to give way to the specific mandate of the Fourth Amendment requiring warrants prior to searches and seizures). For a discussion of the related doctrine of *ejusdem generis* in contract law, see JOHN E. MURRAY, JR., MURRAY ON CONTRACTS 484-85 (4th ed. 2001).

²⁶⁴ See *supra* notes 171-72 and accompanying text.

²⁶⁵ See *supra* notes 171-72 and accompanying text; *Mobile v. Bolden*, 446 U.S. 55, 65, 83-86 (1980) (Stevens, J., concurring).

vis-a-vis other groups in society, the Fifteenth Amendment may be inapplicable; the Fourteenth Amendment Equal Protection Clause may be the only relevant safeguard. The logic is not without some force. Arguably, the placement of an individual in one district instead of another does not deny any citizen a right to register, vote, or be represented.²⁶⁶ Vote dilution through gerrymandering is different than imposing poll taxes and literary tests or physically restraining minorities from entering the voting booth. The former "refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group."²⁶⁷ In sum, the typical sin committed by states in the context of reapportionment involves watering down the right of a particular group to vote; the transgression does not involve taking away rights entirely.²⁶⁸

Yet it is time for the Court to acknowledge that vote dilution claims do implicate the Fifteenth Amendment, directly or indirectly, through the vehicle of the Voting Rights Act. Two decades of litigation has solidified the body of jurisprudence in this area and created settled expectations. It is not seriously questioned that Congress acted within its power, pursuant to the enforcement provision of the Fifteenth Amendment, in adopting and later broadening the reach of the Act. It is too late in the day for the Court to forswear the Fifteenth Amendment entirely in reapportionment matters involving vote dilution.

In adopting the 1982 amendments to the Act, Congress was acutely aware of the danger that "dilution" posed to voting rights of minorities. It therefore took steps to deal with that problem under the Fifteenth and Fourteenth Amendments. The Senate Report which favorably recommended passage of the crucial 1982 amendments was issued after both houses of Congress considered extensive testimony from private individuals and public officials with respect to ongoing abuses of voting rights. New violations had blossomed after the adoption of the 1965 Act.²⁶⁹ One of these, specifically, was vote dilution. The Senate Report stated unequivocally: "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition against casting a ballot."²⁷⁰ The Senate Report pointed to specific evidence which indicated that, after the 1965 Act was adopted

²⁶⁶ See *Shaw I*, 509 U.S. 630, 681-82 (1993) (Souter, J., dissenting). Justice Souter was describing, generally, why districting cases are different than other types of "equality" issues.

²⁶⁷ *Id.* at 682.

²⁶⁸ In *Shaw I*, the Court, per Justice O'Connor, described vote dilution in Fourteenth Amendment equal protection terms. See *id.* at 640-41. See also *Bush*, 517 U.S. at 999-1003 (Thomas, J., concurring) (Justice Thomas indicating that he would apply a strict Fourteenth Amendment scrutiny in all such cases).

²⁶⁹ See Senate Report, *supra* note 17.

²⁷⁰ *Id.* at 6.

and minority voter registration increased, new surreptitious forms of discrimination were developed to dilute the worth of minority votes:

Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact on the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.²⁷¹

Congress was explicit in stating that the 1982 amendments were not designed to "overrule a Supreme Court interpretation of the Constitution" in *Mobile v. Bolden*. Rather, the legislation "provides a statutory prohibition which the Congress finds is necessary to enforce the substantive provisions of the 14th and 15th Amendments."²⁷²

The Senate Report is replete with references to the Fifteenth Amendment (in conjunction with the Fourteenth Amendment), as the foundation for these urgently-needed legislative modifications.²⁷³ Section 1 of the Act, from its inception, mirrored the language of the Fifteenth Amendment. Section 2 was added to implement that provision in a broad fashion to deal with new tactics aimed at abridging the right to vote, including vote dilution accomplished through racial gerrymandering.

Thus, in adopting the 1982 amendments, Congress was concerned that the votes of minorities would be watered down and they would be prevented from electing "candidates of choice." This would directly or indirectly undercut the rights secured to them under the Fifteenth and Fourteenth Amendments. In addition, Congress was fearful that vote dilution would have the further effect of discouraging minorities from registering and casting ballots.²⁷⁴ It would break the determination of minority citizens to participate in the process, just as surely as if poll taxes and physical intimidation were employed.

At the time Congress was amending the Voting Rights Act, in the summer of 1982, James U. Blacksher and Larry T. Menefee published an article in the *Hastings Law Journal* warning that the Fifteenth Amendment was losing its identity in reapportionment cases, even though *Reynolds* had relied in part on that Amendment in develop-

²⁷¹ *Id.*

²⁷² *Id.* at 16-17.

²⁷³ *See id.* at 17, 19, 27, 39, 41.

²⁷⁴ *See id.* at 6 (discussing the central importance of voter registration, in adopting and amending the Act, and the various methods employed to discourage it among minorities).

ing the one-person-one-vote standard.²⁷⁵ The authors proposed that, “[i]f the purpose of the fifteenth amendment is not to be sacrificed entirely to the newfound fourteenth amendment guarantee of majority rule,” a special standard should be developed by the Court to deal with “racial vote dilution.”²⁷⁶ Of course, the enactment of the 1982 amendments to Section 2 of the Voting Right Act and the Court’s subsequent decision in *Thornburg v. Gingles* accomplished part of that proposed goal. But twenty years later, the role or non-role of the Fifteenth Amendment remains a puzzle in vote dilution cases. The Court has balked at identifying how that Amendment intersects with the Fourteenth Amendment, and how each of the Amendments is interwoven with the specific commands of the Voting Rights Act. The case-law remains in tangles. The “predominant factor” test has remained inscrutable, in part because it has failed to articulate how states can adhere to potentially conflicting constitutional and statutory provisions. Reapportionment bodies have continued to walk the tightrope.

The Court should confront this problem head-on. The most honest way to address the constitutional conundrum is as follows: *several* provisions are at work in the unique realm of voting rights litigation. On one hand, it is fair to say that vote dilution cases involve an “unusual form” of Fourteenth Amendment equal protection analysis, as some commentators have suggested.²⁷⁷ On the other hand, one can just as easily say that vote dilution cases require an unusual brand of Fifteenth/Fourteenth Amendment analysis—a hybrid—because Congress has employed its enforcement powers to implicate both provisions.²⁷⁸ Like the endless debate over whether certain confections are candies or breath mints, the true response is that both answers are correct. Congress constructed a bridge, in the form of the Voting Rights Act. That bridge has placed vote dilution claims in the sphere of two equally important constitutional provisions. The Voting Rights Act makes absolutely no sense unless viewed through the lens of both provisions. Equal protection relates to the Voting Rights

²⁷⁵ James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982). The Court in *Reynolds* had considered a long list of Fifteenth Amendment decisions dealing with racial discrimination against black voters. *Reynolds*, 377 U.S. at 554-55. It had then concluded that, because “the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex,” the Fourteenth Amendment prohibited diluting any citizen’s vote based on population or geographic residence. *Id.* at 557 (emphasis added). See Blacksher & Menefee, *supra* at 55.

²⁷⁶ *Id.* at 55.

²⁷⁷ See, e.g., Wickline, *supra* note 174; Karlan, *supra* note 175; *Shaw I*, 509 U.S. at 680-82 (Souter, J., dissenting).

²⁷⁸ See, e.g., Blacksher & Menefee, *supra* note 275; *Mobile*, 446 U.S. at 125-29 (Marshall, J., dissenting).

Act, which relates to the Fifteenth Amendment, which relates to equality in voting rights, all of which are implicated in vote dilution cases.

In the realm of “pure” Fifteenth Amendment cases, involving Section 1, the Court has interpreted that Reconstruction-era Amendment generously. As recently as 2000, in *Rice v. Cayetano*,²⁷⁹ the Court found that the “purpose and command” of the Fifteenth Amendment were “explicit and comprehensive.”²⁸⁰ It struck down a provision of the Hawaiian Constitution that limited the right of certain citizens to vote in a statewide election for trustees.²⁸¹ With respect to Section 2 of the Amendment, the Court should be equally generous in its interpretation. The Court should honor Congress’s careful judgment, in exercising its enforcement power under Section 2—after a prolonged process of trial and error—and acknowledge that it is broad enough to address a wide range of subtle discriminatory practices, including vote dilution. As the debates and hearings in 1982 revealed, that device presents a particularly nettlesome problem; Congress has done its best to devise a modern solution through Section 2 of the Voting Rights Act, and it has been largely successful.

We have learned from a century-and-a-half’s worth of history, since the conclusion of the Civil War, that race and politics are inseparable. We have also learned that the number and manner of subtle ways in which the majority in power may seek to disadvantage racial minorities, in the voting process, are as numerous and varied as human ingenuity itself.²⁸² Indeed, we may already have reached the day in which state redistricting bodies intentionally and overtly consider race in crafting districts, with an insincere nod of deference to the Voting Rights Act, while scurrying around in back-rooms calculating how to have their own maps struck down as unconstitutional at a later stage, in order to silently maintain the majority’s dominance. As the Pennsylvania experience demonstrated, the unexpected must always be expected in redistricting. Double-dealing and racial mind-games are the norm.

The “predominant factor” test has gradually developed in a fashion that smokes out most inappropriate efforts to exalt racial considerations over traditional districting principles that have legitimately guided the states since their creation. With a modest amount of re-tooling, the “predominant factor” test has the capacity to effectively

²⁷⁹ 528 U.S. 495 (2000).

²⁸⁰ *Id.* at 511.

²⁸¹ The provision in question provided that, in elections for trustees of the Office of Hawaiian affairs, only “Hawaiians” (defined as descendants of the original inhabitants of the Hawaiian Islands in 1778) could vote. *Id.* at 498-99.

²⁸² See *Shaw I*, 509 U.S. at 670 (White, J., dissenting) (stating that “racial gerrymanders come in various shades,” and setting forth examples).

guide those in the thick of reapportionment work. It can not only illuminate those instances in which race has been improperly over-emphasized in the redistricting process, but also those situations in which racial considerations can fall within the state's appropriate zone of discretion in constructing sensible legislative districts. That will mark a great victory for the twin provisions of the Fourteenth and Fifteenth Amendments. For those two Reconstruction-era Amendments were never meant to work at odds with one another. Rather, operating in tandem, they were both designed to achieve the same laudable goal, which remains the same today: to allow mere mortals, entrusted with political power, to disperse it in a sound and equitable manner, so that the most basic privilege of American society can be enjoyed by all citizens.